NAVAL WAR COLLEGE

# INTERNATIONAL LAW DECISIONS AND NOTES

1922

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## PREFACE.

The discussions on international law in 1922 were, as in recent years, conducted by George Grafton Wilson, LL. D., professor of international law in Harvard University. These discussions particularly called to the attention of the officers of the Navy the wide departure from earlier precedents which the prize courts of some of the belligerents had made during the World War.

For convenience a few from many cases, mainly from foreign courts, have been selected and the decisions are printed in this volume as illustrative.

It is necessary to emphasize the fact that some of these decisions were considered too extreme to serve as safe precedents.

C. S. WILLIAMS,
*Rear Admiral, U. S. Navy,*
*President, Naval War College.*

DECEMBER 26, 1922.

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[1] The cases are arranged in chronological order according to date of decision.

# INTERNATIONAL LAW: DECISIONS AND NOTES.

PRELIMINARY NOTE.—Very many cases relating to maritime warfare were decided by the courts of different States during the World War. Some of these cases have received consideration at the Naval War College. Not all the decisions have been approved as worthy precedents, but the decisions show the attitude of the courts at the time when they were rendered. In spite of the fact that some of the decisions of foreign States may not accord with the opinions handed down by American courts, or with some authorities upon international law, these decisions will have weight when similar cases arise.

The prize cases and related cases of the World War fill many volumes. A few only of these cases can be included in this volume. Decisions of the French *Conseil des Prises* have been printed in French. German decisions have been printed in translation. American and British opinions are from the official reports.

Some of these cases and many others will necessarily receive further attention at the Naval War College, because, accepted as precedents, changes in international practice will be involved. It is advantageous to naval officers to know that the decisions of courts during the World War gave evidence of departure from earlier precedents somewhat comparable to the changes in the conduct of hostilities.

The cases decided during the earlier period of the World War show greater evidence of respect for accepted and conventional principles of international law. The strain of hostilities seems to have influenced later decisions favorably to belligerents. The issuance of retaliatory orders led the prize court into new fields wherein the court declares itself ill qualified and "Still less would it be proper for such a court to inquire into the reasons of policy, military or other, which have been the cause and are to be the justification for resorting to retaliation for that misconduct," page 180. Yet it is maintained that "Disregard of a valid measure of retaliation is as against

neutrals just as justiciable in a court of prize as is breach of blockade or the carriage of contraband of war," page 189.

The neutrals in the World War were in many cases weak or timid and belligerent disregard of neutral rights was the natural consequence. This has not been the case in wars of the later nineteenth century, and if wars subsequently occur it may not then be the case. It seems to be evident that the area of war is not limited nor its end hastened by meek submission on the part of neutrals to disregard of those rights which have been obtained after long years of struggle.

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## THE "BERLIN."[1]

HIGH COURT OF JUSTICE.
PROBATE, DIVORCE, AND ADMIRALTY DIVISION.
ADMIRALTY.

[IN PRIZE.]

October 7. 26, 29, 1914.

[1914] P. 265.

October 29. SIR SAMUEL EVANS, president. In this case the Crown asks for the condemnation of the sailing ship, the *Berlin*, and her cargo as enemy property. No claim has been made in respect thereof; but it is, nevertheless, necessary to investigate the facts, and particularly to ascertain whether by international law the ship is immune from capture as a fishing vessel.

Statement of the case.

The *Berlin*, as appeared from the ship's papers, was a German fishing cutter of 110 metric tons, built in 1892, and manned by a crew of 15 hands. She belonged to the port of Emden, and was owned by the Emden Herring Fishing Co. She had on board 350 empty barrels, 100 barrels of salt, 50 barrels of cured herrings, and ship's stores in 15 barrels. She carried one boat and had two drifts of nets, consisting of 42 and 43 nets each drift, 2 bush ropes, and a small steam boiler and capstan. The vessel, as appeared from her log, had been on a fishing

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[1] *Note as to sources of decisions.*—The single American decision, the *Appam*, involving American, British, and German rights, is from the Supreme Court Reports of the United States. The British decisions are from different sources as indicated in each case. The French decisions are from the Decisions du Conseil des Prises. The German decisions are translated from the Entscheidungen des Oberprisengerichts in Berlin.

The decisions are arranged in chronological order as in the volume published by the Naval War College in 1904, Recent Supreme Court Decisions and Other Opinions and Precedents.

voyage in the North Sea for a considerable time. From July 27 onward she had been catching herrings, fishing in latitudes between 55° and 58° 30′ N., and in longitudes between 1° E. or W., and in depths of from 66 to 148 meters. Her position on August 1–2, as given in her log, was latitude 55° 35′ and longitude 0° 32′, and on August 4–5, latitude 58° 28′ and longitude 0° 33′. She was at these times, therefore, far out in the North Sea, at distances 100 miles, more or less, from the nearest coast, namely, Great Britain, and 500 miles, more or less, from her home port, and from the German coast. She was brought into the port of Wick in the early morning of August 6 by the steamship *Ailsa*, and given into the possession of the chief officer of customs, who detained her as prize captured at sea.

Capture.

There was no direct evidence in the legal sense, as used in our municipal courts of law, of her capture by one of His Majesty's ships or of the place or time of her capture. It was reported to the officer of the *Ailsa* that she had been captured by H. M. S. *Princess Royal*, and by him that she was handed over by the commander to the *Ailsa* to be taken into Wick Harbor. I saw a confidential report made in the course of his official duty by the commander of H. M. S. *Princess Royal* of the capture, and it appeared that the exigencies of war rendered it necessary for him to request the *Ailsa* to take the captured vessel to Wick Harbor on his behalf. It appeared also that the capture took place at 11.30 a. m. on August 5. I should, apart from this, have presumed that the capture was not made until after war was declared on August 4 (11 p. m.). When the capture took place the vessel was in the North Sea in the position which I have approximately stated.

Evidence.

It would have been advisable, inasmuch as His Majesty's ship was unable to take the captured vessel to port, or to put a prize crew on board for the purpose, for the commander of the *Princess Royal* to enter the time and place of capture in the vessel's log, or to make a declaration in the presence of the vessel's master, lest objection might be made of the absence of direct legal evidence. But fortunately, in this court, I am entitled to act upon other evidence or reliable information, and to draw inferences therefrom, upon which the court may think it safe and just to act. Eminent judges (among them Lord Russell of Killowen) have commented upon the strict

technicalities of some of the rules of evidence in our courts of law; and admirable and wholesome as they are in the main, it would appear that some of them tend to shut out facts which might with advantage to the course of justice be made known to the court. However this may be, the prize court is not bound by such confining fetters as our municipal courts. Upon this subject Doctor Lushington laid down the practice as follows:

"With regard to the evidence to be produced in the Admiralty courts with respect to blockades, and, indeed, I may say all other questions of prize, I believe the practice to have been, not to entertain objections to the admissibility of the evidence offered, but to receive all that might be tendered; and certainly we have in this case the license of evidence of every kind and description which could well be offered to the consideration of the court.

"I apprehend that this, so far as I know, the universal practice of the court, was adopted for several reasons. First, because the prize court being, not a municipal court but a court for the administration of public law, was not restrained, with regard to evidence, by those rules which are applicable to questions of municipal law.

"Secondly, it would be most difficult, even if possible, to have laid down any rules of evidence, because this court, having to concern itself with the transactions of various nations, could never construct a code in conformity with all their various rules, and consequently injustice might be done by excluding, in transactions in which they were interested, proofs recognized by themselves.

"Thirdly, because of the extreme difficulty of procuring what we are accustomed to call the best evidence, when such evidence is to be obtained from distant countries.

"Fourthly, because, though the court may receive all, it will form its own judgment, according to the circumstances of the case, of the weight to be attributed to each species of evidence, and is not supposed to be liable to the error of giving undue importance to any evidence merely because it does not exclude it": The *Franciska*.[2]

I have stated the conclusions of fact to which I have come in the present case.

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[2] (1855) Spinks 287; 2 Eng. P. C. 346.

The question now remains whether this vessel, the *Berlin*, is immune from capture as a coast fishing vessel.

Immunity of fishing vessels.

The history of the varying practices in this and other countries of exempting from capture in war vessels engaged in coast fishing up to the year 1899 has been given in the Supreme Court of the United States of America in the case of the *Paquete Habana* and the *Lola*.[3] The judgment of the court was delivered by Gray, J. It is full of research, learning, and historical interest.

As such an elaborate and complete résumé is available in that judgment, it would be a work of supererogation for me to attempt to perform a similar task.

The conclusions stated by Gray, J., and which form the judgment of the majority of the Supreme Court, were as follows:

"This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war. The exemption, of course, does not apply to coast fishermen or their vessels if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way. Nor has the exemption been extended to ships or vessels employed on the high seas in taking whales or seals, or cod, or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce. This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own Government in relation to the matter."

Japanese regulations.

Since the date when that judgment was pronounced the matter has been dealt with by Japan in its prize regu-

[3] 175 U. S. 677.

lations, and in some of its prize court decisions, and it forms also the subject of an article in one of The Hague conventions of 1907.

Article 35 of the Japanese regulations governing captures at sea, which came into force on March 15, 1904, provides as follows:

"All enemy vessels shall be captured. Vessels belonging to one of the following categories, however, shall be exempted from capture if it is clear that they are employed solely for the industry or undertaking for which they are intended:

"(1) Vessels employed for coast fishery.

"(2) Vessels making voyages for scientific, philanthropic, or religious purposes.

"(3) Lighthouse vessels and tenders.

"(4) Vessels employed for exchange of prisoners."

In the case of the *Michael*,[4] heard in the Japanese Prize Court in 1905, which related to what was alleged to be a deep-sea fishing vessel, it was claimed that—

Japanese decisions.

"The vessel, though a deep-sea fishing vessel, was not engaged in traffic forbidden in time of war, nor was she carrying contraband of war, and consequently being harmless should be released, in accordance with the intention which underlies the exemption from capture of small coastal fishing boats." Upon this the decision of the court ran as follows: "The claimants also argued that the vessel should be released in accordance with the intention underlying the exemption from capture of small coastal fishing boats; but the usage of international law by which small coastal fishing boats are not captured arises mainly from the desire not to inflict distress upon poor people who are not connected with the war, and the principle can not be extended to a vessel like the *Michael*, which was the property of a company and engaged in deep-sea fishing."

The point was not raised in the higher prize (appeal) court. Similarly, in the case of the *Alexander*,[5] the same court pronounced as follows:

"It is also argued by the claimants that the vessel should be released in accordance with the intention underlying the exemption from capture of small coastal fishing vessels, but the usage of international law by

[4] Russian and Japanese Prize Cases (1913), vol. 2, p. 80.

[5] Russian and Japanese Prize Cases, vol. 2, p. 86.

which small coastal fishing vessels are not captured arises mainly from the desire not to inflict distress on poor people who are not connected with the war, and clearly can not be extended to a vessel like the *Alexander*, the property of a company, and, moreover, engaged in deep-sea fishing."

Upon appeal one of the grounds of appeal was:

"Again, the reasoning in the decision appealed from, that as the exemption from capture of small coastal fishing vessels chiefly arose from a desire not to inflict distress upon poor people unconnected with the war, it could not therefore be extended to a vessel like the *Alexander*, which was engaged in deep-sea fishing, shows that the claimants' point had not been understood. What the claimants desired was that the imperial prize court should, in the light of recent developments in international law, not adhere to old usages, but create new precedents."

Upon which the court adjudged in somewhat quaint fashion as follows:

"The appellants also desired that a new precedent should be established in the light of recent developments of international law by the exemption from capture of a vessel which, as in the present case, was engaged in deep-sea fishing. * * * The appellants' request that a new precedent should be created by the exemption from capture of a deep-sea fishing vessel is nothing more than the simple expression of their hopes, and this ground of the appeal is therefore also devoid of substance."

Hague Convention, IX.

I do not propose to make any pronouncement in the case now before the court as to whether the German Empire or its citizens have in the circumstances of this war the right to claim the benefit of The Hague convention. But in order to show how the doctrine with which I am now dealing has been treated by the nations with the progress of years and events, I refer to article 3 of The Hague convention, XI, 1907, which is as follows:

"Vessels employed exclusively in coast fisheries, or small boats employed in local trade, are exempt from capture, together with their appliances, rigging, and cargo. This exemption ceases as soon as they take any part whatever in hostilities. The contracting powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance."

In this country I do not think any decided and reported case has treated the immunity of such vessels as a part or rule of the law of nations: vide the *Young Jacob and Johanna*[6] and the *Liesbet van den Toll.*[7]

British doctrine.

But after the lapse of a century, I am of opinion that it has become a sufficiently settled doctrine and practice of the law of nations that fishing vessels plying their industry near or about the coast (not necessarily in territorial waters), in and by which the hardy people who man them gain their livelihood, are not properly subjects of capture in war so long as they confine themselves to the peaceful work which the industry properly involves.

The foundation of the doctrine is stated by Hall[8] as follows:

"It is indisputable that coasting fishery is the sole means of livelihood of a very large number of families as inoffensive as cultivators of the soil or mechanics, and that the seizure of boats, while inflicting extreme hardships on their owners, is as a measure of general application wholly ineffective against the hostile State."

The rule is formulated by Westlake (International Law, Part II, War, p. 133) in these terms:

"Coast fisheries: Immunity from capture on the ground of their being enemies or enemy property, but not from capture and condemnation on the ground of breach of blockade, is enjoyed by the men, boats, and tackle employed in coast fisheries, and their cargoes of fresh fish, including fish kept alive by contrivances on their way to market; so long as the men and boats are not engaged in any warlike employment—in which scouting, exchanging signals with the forces on their side, and carrying arms would be included—so long also as, in the opinion of the hostile Government or its naval commanders concerned, they are not likely to be engaged in any warlike employment"—and he adds: "If the opinion here referred to is only that of the naval commanders concerned, the prize court before which the captures are brought will have to release them unless the warlike intention of the captured is proved to its satisfaction; but if the captures were made in pursuance of a Government order, the prize court, in the absence of anything to the contrary in the constitution of the country, will

[6] 1 C. Rob. 20. [7] (1804) 5 C. Rob. 283. [8] International Law (6th ed.), p. 446.

be bound by such an order as emanating from the authority under which it sits."

It is obvious that in the process of naval warfare in the present day such vessels may without difficulty and with great secrecy be used in various ways to help the enemy. If they are, their immunity would disappear; and it would be open to the naval authorities under the Crown to exclude from such immunity all similar vessels if there was reason for believing that some of them were utilized for aiding the enemy. And this seems to be the sense in which the second paragraph of article 3 of The Hague convention referred to should be regarded.

Decision.

As to the *Berlin*, I am of opinion that she is not within the category of coast fishing vessels entitled to freedom from capture; on the contrary, I hold that, by reason of her size, equipment, and voyage, she was a deep-sea fishing vessel engaged in a commercial enterprise which formed part of the trade of the enemy country, and, as such, could be and was properly captured as prize of war.

I therefore decree the condemnation of the vessel and cargo, and order the sale thereof.

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## THE "MIRAMICHI."

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

[In Prize.]

November 23, 1914.

[1914] P. 71.

Statement of the case.

The subject matter of the claim in this case is a part cargo of 16,000 bushels of wheat carried on the steamship *Miramichi*, which was seized or captured as enemy property on September 1, 1914, in the circumstances hereinafter mentioned.

The steamship *Miramichi* was a British ship. The cargo of wheat to which the claim relates was shipped at Galveston, Tex., and was stowed, with other wheat, in holds 1, 4, and 6 of the vessel. It was shipped in the month of July, 1914, before the commencement of the war, and without any anticipation of war. It was destined for the port of Rotterdam, and was intended to

be delivered, as to part, to George Fries & Co., of Colmar, as purchasers of 8,000 bushels, and, as to the other part, to Gebrueder Zimmern & Co., of Mannheim, as purchasers of 8,000 bushels. Both these firms were German firms, and at the time of seizure or capture of the cargo were enemy subjects.

The two transactions were separate; but there is no distinction in substance, or from the legal aspect, between the two. It will therefore be sufficient to deal in this judgment with one of the cases; and I will take the first, namely, the case of the sale by Messrs. Muir & Co. to Fries & Co.

The cargo of wheat destined for Fries & Co. was, as I have said, laden on board the British steamship *Miramichi*. On her voyage toward Rotterdam, her owners by telegraph directed the vessel to proceed to Queenstown for orders by reason of the outbreak of war. At Queenstown the owners communicated with the British Admiralty and asked their instructions as to whether the steamship could proceed to Rotterdam, as the cargo was destined for German merchants. Permission to proceed to Rotterdam was refused, and accordingly the vessel proceeded to the port of Eastham, in the Manchester Ship Canal, as the best port for the disposal of the cargo.

A question might have arisen as to whether the cargo was captured at sea or seized in port. But that makes no material difference in this case, and it is agreed that the cargo was seized in the port of Eastham.

The seizure was on September 1, 1914. The Crown claims the cargo as prize or as droits of admiralty. The claimants, on the other hand, contend that the cargo was not subject to seizure as it did not belong to enemy subjects, but to themselves as neutrals, being citizens of the United States of America.

November 23. Sir Samuel Evans, president. [After stating the facts already set out the learned president continued:] The contest between the Crown and the claimants may be shortly stated as follows:

The contention of the attorney general for the Crown was that the cargo at the time of seizure was at the risk of subjects of the German Empire, then at war, as purchasers, and therefore was subject to seizure on behalf of the Crown. The contention of the claimants, on the con-

trary, was that the cargo was their property, and therefore could not be lawfully seized.

Contract for sale and purchase.

The facts as to the contract for sale and purchase of the cargo must now be stated in substance, but briefly.

I will premise that the contract, and all material transactions in relation to it up to the time of seizure of the cargo, were entered into before the war and in entire innocence of any anticipation of war. In short, all the transactions so far as concerned the claimants were carried out in times and conditions of peace. The claimants were the sellers of the goods, and their bankers who discounted the bill of exchange. They have made common cause, and no distinction need be made between them in this judgment. I will describe the claimants, Messrs. Muir & Co., as "the sellers," and Fries & Co., the German merchants, as "the buyers."

The sellers contracted to sell the cargo to the buyers on June 25 for shipment during the month of July, 1914, from a port of the United States of America direct or indirect to Rotterdam at a price to include cost, freight, and insurance; in other words, the contract was what is so well known as a c. i. f. contract. Payment (or in the American terminology "reimbursement") was to be "by check against documents." The sellers were to furnish policies of insurance, or certificates of insurance (free of war risk). A clause for settlement of disputes in London was included, which shows (apart from anything else) that any disputes were to be determined according to English law.

The sellers had bought the wheat to enable them to fulfill their contract with the buyers from C. B. Fox, a grain merchant in Galveston.

The wheat was shipped by Fox at Galveston on July 23, 1914. The bill of lading was given in favor of Fox, the shipper, and was made out unto the order of one Davis, or to his or their assigns. It was indorsed generally, and in due course the sellers paid Fox for the wheat and obtained the bill of lading. They did not indorse it in favor of the buyers, and it remained a bill of lading only indorsed generally.

The necessary insurances were effected and the certificates of insurance were obtained by the sellers on July 23.

On July 28 the sellers drew a bill of exchange upon the buyers and, according to the statement of the attorney

general, discounted it with the bankers (the Guaranty Trust Co. of New York, who have joined them as claimants). On the same date they deposited with the bankers the bill of lading and certificates of insurance to be delivered upon payment by the buyers through a Berlin bank of the amount due on the bill of exchange for the cost and insurance, less the freight, which was credited, as it was to be paid for by the buyers on delivery.

On the same date also the original documents were forwarded to the Berlin bank for credit of the New York bank by the steamship *Savoie*, which sailed from New York on July 29 and arrived at Le Havre on August 5; and duplicate documents were forwarded by the steamship *Carmania*, which sailed from New York on July 29 and arrived at Liverpool on August 7. The buyers were duly notified of these matters, and an invoice was forwarded to them by the sellers on the same day (July 28) with all the necessary particulars of the shipment, bill of exchange, and documents.

So far as the buyers are concerned, no further information was given to the court except that the documents were tendered to them, and that on the tender they refused to accept the documents, or to pay the sum due under the bill of exchange and indorsed on the bill of lading as follows: "Refused on account of late production, nearly one month after normal due date. Colmar, September 3, 1914. Geo. Fries."

That reason was a mere excuse; the real reason, no doubt, was that war had broken out. The sellers, therefore, or their bankers, still hold the bill of lading, and the bill of exchange remains unpaid.

These, I think, are all the material facts.

Capture.

The question of law, as I have stated, is, Was the cargo on September 1 subject to seizure or capture by or on behalf of the Crown as droits of admiralty or prize?

Before this question is dealt with, I desire to point out, and to emphasize, that nothing which I shall say in this case is applicable to capture or seizure at sea or in port of any property dealt with during the war, or in anticipation of the war. Questions relating to such property are on an entirely different footing from those relating to transactions initiated during the happier times of peace. The former are determined largely or mainly upon considerations of the rights of belligerents and of attempts to defeat such rights. I will refrain from dis-

cussing these matters, and will only refer to such authorities as the *Sally*,[9] heard on appeal by the Lords Commissioners of Appeals in prize in 1795, the *Packet de Bilbao*,[10] and the *Ariel*,[11] for the principles applicable in the prize court during a state of war.

In the case now before the court, there is no place for any idea of an attempt to defeat the rights of this country as a belligerent; and the case has to be determined in accordance with the principles by which rights of property are ascertained by our law in time of peace.

The main contest was as to the right test to apply in these circumstances for determining whether a particular property was subject to seizure or capture. Another point was taken and argued, chiefly by junior counsel for the claimants, that in any event enemy property in a British ship could not be seized in port or captured at sea.

I will state the contention and propositions submitted by the learned attorney general in his own words.

He said, "My first proposition is that the test of the right to capture and sale is the answer to the question on whom is the risk at the moment of capture? That is to say, Who suffers if the goods are captured? Applying that test, the American claimants here would have had a 'jus disponendi' because they are holding the bill of lading, which has not been indorsed, and therefore they would have to that extent of course a special property, a property interest in the cargo, but they would not have a general property in the cargo; still less would they have the risk; and there is a third proposition, which is really a development of the other proposition, namely, the American sellers had a vested right of payment, whatever happened to the goods on the tender of the documents; and I will add as a point for my third proposition that for the purpose of determining whether the cargo is good prize (which is quite a separate question from the other), the material question is not the abstract question of property, but whether it is an enemy or a neutral who will suffer if the cargo is condemned—on whom is the risk?" And summing it up the learned attorney general later submitted, "If my main proposition is right, in a prize court one is not concerned with

Risk.

Jus disponendi.

[9] (1795) 3 C. Rob. 300, note. [10] (1799) 2 C. Rob. 133. [11] (1857) 11 Moo. P. C. 119.

these niceties about the abstract law of property; but the point really is, at the moment of capture, the goods being on the high seas, is it or not open to the consignor to compel payment by the consignee? That is the real test. Then plainly I am entitled here to the condemnation of the goods."

As I have intimated, it was subsequently assumed, and for this purpose agreed by the attorney general, that the goods were seized when afloat in port; but that makes no material difference.

Beneficial ownership.

The contrary contention of Mr. Leslie Scott for the claimants was that "the true criterion to apply where goods are shipped before war is, Whose goods are they? In whom is the property—in the sense of a beneficial ownership of the goods—vested?"

Very difficult questions often arise at law as to when the property in goods carried by sea is transferred, or vests; and at whose risk goods are at a particular time, or who suffers by their loss.

These are the kind of questions which are often brushed aside in the prize court when the transactions in which they are involved take place during war or were embarked in when war was imminent or anticipated.

But where, as in the present case, all the material parts of the business transaction took place bona fide during peace, and it becomes necessary to decide questions of property, I hold that the law to be applied is the ordinary municipal law governing contracts for the sale and purchase of goods.

Transfer in peace.

Where goods are contracted to be sold and are shipped during peace without any anticipation of imminent war, and are seized or captured afloat after war has supervened, the cardinal principle is, in my opinion, that they are not subject to seizure or capture unless under the contract the property in the goods has by that time passed to the enemy.

It may be that the element of risk may legitimately enter into the consideration of the question whether the property has passed or has become transferred. But the incidence of risk or loss is not by any means the determining factor of property or ownership. (Cf. s. 20 of the sale of goods act, 1893.) The main determining factor is whether according to the intention of seller and buyer the property had passed.

The question which governs this case, therefore, is, whose property were the goods at the time of seizure?

This principle is consonant with good sense, and with the notion of what is right in commercial dealings. It is also in accordance with the doctrines adopted by the eminent jurists who have become authorities on the law of nations, and applied in the decisions of our prize courts (see e. g., The *Cousine Marianne*,[12] The *Ida*,[13] The *Abo*,[14] The *Vrow Margaretha*,[15] and The *Ariel*.[16]

The learned attorney general by the tenor of his argument rendered it almost unnecessary for me to go through the many authorities dealing with the vesting or transfer of property under such a contract, or to discuss the question whether the property in this case had, on September 1, passed from the sellers and become vested in the buyers.

He did not, as I understood, argue that the property had passed to the enemy buyers. He admitted that the neutral sellers had a jus disponendi, because they held the bill of lading, which was not indorsed; although possibly he may have intended to qualify this admission by saying that "Therefore the sellers would have, to that extent, a special property" in the goods.

But at any rate, as he did not contend that by law the property had passed to the buyers, I think it sufficient to deal very briefly with the matter, and to state my conclusions without elaborating the grounds.

In my opinion the result of the many decisions from Wait *v.* Baker[17] up to Ogg *v.* Shuter,[18] Mirabita *v.* Ottoman Bank,[19] and thence up to the sale of goods act, 1893, and of the provisions of the sale of goods act, 1893, itself, following closely on these matters the judgment of Cotton L. J., in Mirabita *v.* Ottoman Bank[19] (3); and of the decisions subsequent to the act, e. g., Dupont *v.* British South Africa Co.,[20] Ryan *v.* Ridley,[21] and Biddell *v.* E. Clemens Horst[22], is that, in the circumstances of the present case, the goods had not at the time of seizure passed to the buyers; but that the sellers had reserved a right

[12] (1810) Edw. 346.
[13] (1854) Spinks, 26.
[14] (1854) Spinks, 42.
[15] (1799) 1 C. Rob. 336.
[16] 11 Moo. P. C. 119.
[17] (1848) 2 Ex. 1.
[18] (1875) 1 C. P. D. 47.
[19] (1878) 3 Ex. D. 164.
[20] (1901) 18 Times L. R. 24.
[21] (1902) 8 Com. Cas. 105.
[22] [1911] 1 K. B. 214, 934; [1912] A. C. 18.

of disposal or a jus disponendi over them, and that the goods still remained their property, and would so remain until the shipping documents had been tendered to and taken over by the buyers, and the bill of exchange for the price had been paid.

Decision.

It follows that the goods seized were the property of the American claimants, and were not subject to seizure; the court decrees accordingly, and orders the goods to be released to the claimants.

The other point referred to remains; and as it was argued and has been foreshadowed in other cases, I will deal with it, although, in view of the decision just given, it becomes immaterial.

Cargo in British ship.

It is that as the cargo was in a British ship, it could not be seized or captured even if it was enemy property.

In my opinion this proposition is wholly lacking in foundation. No authority was cited for it. Such a contention has never been put forward, because, as I think, no one has thought that it could prevail.

Enemy property at sea or in port can be captured or seized except where an express immunity has been created.

Wheaton's opinion.

Abundance of authority exists for this in the acknowledged books of international jurists. I will only cite one, namely, Wheaton; I will cite from what is regarded as the best edition, that of Mr. Dana, published in 1866. After an exhaustive and most interesting account of the right of capture according to the usage of war on land and on sea, Wheaton wrote as follows: "Section 355. The progress of civilization has slowly, but constantly, tended to soften the extreme severity of the operations of war by land; but it still remains unrelaxed in respect to maritime warfare, in which the private property of the enemy taken at sea or afloat in port is indiscriminately liable to capture and confiscation. This inequality in the operation of the laws of war, by land and by sea, has been justified by alleging the usage of considering private property, when captured in cities taken by storm, as booty; and the well-known fact that contributions are levied upon territories occupied by a hostile army, in lieu of a general confiscation of the property belonging to the inhabitants; and that the object of wars by land being conquest or the acquisition of territory to be exchanged as an equivalent for other territory lost, the regard of the victor for those who are

to be or have been his subjects naturally restrains him from the exercise of his extreme rights in this particular; whereas, the object of maritime wars is the destruction of the enemy's commerce and navigation—the sources and sinews of his naval power—which object can only be attained by the capture and confiscation of private property."

I will also cite Mr. Dana's note upon this section as it was written years after the declaration of Paris.

Dana's comment.

"Note 171. Distinction between enemy's property at sea and on land. The text does not present the principal argument for the distinction observed in practice between private property on land and at sea; nor, indeed, has this subject been adequately treated upon principle, if that has even been attempted, by most text writers. War is the exercise of force by bodies politic for the purpose of coercion. Modern civilization has recognized certain modes of coercion as justifiable. Their exercise upon material interests is preferable to acts of force upon the person. Where private property is taken, it is because it is of such a character or so situated as to make its capture a justifiable means of coercing the power with which we are at war. If the hostile power has an interest in the property which is available to him for the purposes of war, that fact makes it prima facie a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea; for it is a subject of taxation, contribution, or confiscation. The humanity and policy of modern times have abstained from the taking of private property, not liable to direct use in war, when on land. Some of the reasons for this are the infinite varieties of the character of such property—from things almost sacred to those purely merchantable; the difficulty of discriminating among these varieties; the need of much of it to support the life of noncombatant persons and of animals; the unlimited range of places and objects that would be opened to the military; and the moral dangers attending searches and captures in households and among noncombatants. But on the high seas these reasons do not apply. Strictly personal effects are not taken. Cargoes are usually purely merchandise. Merchandise sent to sea is sent voluntarily; embarked by merchants on an enterprise of profit, taking the risks of

war; its value is usually capable of compensation in money, and may be protected by insurance; it is in the custody of men trained and paid for the purpose; and the sea, upon which it is sent, is res omnium, the common field of war as well as of commerce. The purpose of maritime commerce is the enriching of the owner by the transit over this common field; and it is the usual object of revenue to the power under whose government the owner resides.

Summary.

"The matter may, then, be summed up thus: Merchandise, whether embarked upon the sea or found on land, in which the hostile power has some interest for purposes of war, is prima facie a subject of capture. Vessels and their cargoes are usually of that character. Of the infinite varieties of property on shore some are of this character and some not. There are very serious objections of a moral and economical nature to subjecting all property on land to military seizure. These objections have been thought sufficient to reverse the prima facie right of capture. To merchandise at sea these objections apply with so little force that the prima facie right of capture remains."

There is no distinction now to be made between capture at sea and seizure in port; and apart from the practice introduced by the declaration of Paris in favor of neutral vessels it does not matter in what ships the cargoes seized or captured may happen to be. According to the order made in council, in 1665, as to the rights of the Lord High Admiral in former times, which are now the rights of the King in his office of admiralty, "all ships and goods coming into ports, creeks, or roads of England or Ireland, unless they come in voluntarily on revolt or are driven in by the King's cruisers," belonged to the lord high admiral, and now belong to the Crown, and according to Lord Stowell, "Usage has construed this to include ships and goods already come into ports, creeks, or roads, and these not only of England and Ireland, but of all the dominions thereunto belonging"; see the *Rebeckah*.[23]

Order in Council 1665.

Enemy goods in British ships.

It has never been urged that enemy goods are free from capture or seizure if they happen to be in British ships. This is, no doubt, the reason why there are no reported judgments upon the point, but if decisions of prize courts are desired to show that enemy cargoes in British ships have been captured, reference can be made to the *Con-*

[23] (1799) I. C. Rob. 227.

*queror* [24] and the *Mashona*,[25] and the Journal of Comparative Legislation, 1900, page 326. See also The Cargo ex *Emulous*,[26] sub nomine Brown *v.* The United States,[27] for the opinion of Story J. in similar cases.

As to the suggestion that the right of seizure or capture of enemy property carried as cargoes in British ships no longer exists after the declaration of Paris, it is obvious that the declaration only modified or limited the right in favor of neutrals for the benefit and protection of the commerce of neutrals and in the interest of international comities, and did not in any other respect weaken or destroy the general right.

American doctrine.

It is well known that the United States of America refrained from acceding to the declaration of Paris because they desired that all property of private persons should be exempted from capture at sea—to which most other States have always refused to agree.

And in practice what would become of such cargoes? A British ship could not, in times of war, carry it or hand it over to the enemy either directly or through any intermediary, as it is not permitted to her to have any intercourse with the enemy.

In my view it is abundantly clear that enemy goods carried in British vessels are subject to seizure in port and capture at sea in times of war.

As the cargo has been sold, the order of the court will be for the payment out of the proceeds to the claimants.

The Attorney General. I ask for a reasonable time for appealing.

The President. Certainly. Stay of proceedings for three weeks, and, if notice is given for appeal, stay of proceedings will be till the hearing of the appeal.

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## THE "MARIA."

### IN H. B. M. PRIZE COURT FOR EGYPT.

March 17, 1915.

1 Trehern, British and Colonial Prize Cases, 259.

Statement of the case.

Claim for condemnation of the Turkish sailing ship *Maria*, a vessel of 27 tons engaged in general coasting

[24] (1800) 2 C. Rob. 303.
[25] (1900) 10 Cape Times L. R. 163.
[26] (1813) 1 Gallison, 563.
[27] (1814) 8 Cranch, 110.

trade, which was seized at Alexandria shortly after the outbreak of war between Great Britain and Turkey on November 5, 1914.

Hague Conventions VI and XI.

GRAIN, J.: I am of opinion that counsel who appears on behalf of the master and owner of this vessel, the sailing ship *Maria*, has not been able to show any cause why she should not be condemned. He admits that she does not come under Convention VI or XI of The Hague Conference, 1907, as although Turkey was a party to that conference, and the conventions were signed by her diplomatic representative, they were never ratified by the Sultan of Turkey. But he submits that she comes under an established rule of law that small coasting vessels are exempt from capture and confiscation, and he quotes the judgment of Sir Samuel Evans in The *Berlin* (ante, p. 29; [1914] p. 265), in which he states his opinion "that it has become a sufficiently settled doctrine and practice of the law of nations that fishing vessels plying their industry near or about the coast * * * are not properly subjects of capture in war so long as they confine themselves to the peaceful work which the industry properly involves."

Decision.

I am of opinion that this dictum applies merely to small fishing boats belonging to men who are earning their livelihood and supplying the food of the small communities on the coasts. The vessel now before me is a general trading vessel of 27 tons, carrying on the general trade of the country, and, as The Hague conventions do not apply, is liable to capture and confiscation. This ship is therefore an enemy ship lawfully captured, and the order of the court is that she be confiscated and sold.[23]

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## THE "PAKLAT."

Supreme Court of Hong-Kong. In prize, April 14, 15, 1915.

1 Trchern, British and Colonial Prize Cases, 515.

CAUSE FOR CONDEMNATION OF ENEMY SHIP AS PRIZE.

On August 21, 1914, the *Paklat*, a German steamship of 1,657 tons belonging to the Norddeutscher Lloyd Linie, whilst bound from Tsingtau to Tientsin with women and children refugees, was captured by H. M. S. *Yarmouth* and brought to Hong-Kong as prize. The blockade of

[23] See note, ante, p. 122.

Tsingtau was then imminent, and it was in fact besieged by the allied forces on August 27.

It was contended on behalf of the owners that the vessel, which, it was alleged, was going to be interned at Tientsin to be used for the housing of destitute refugees, was "employed on a philanthropic mission" within the meaning of article 4 of the Eleventh Hague Convention, which exempts from capture "vessels employed on religious, scientific, or philanthropic missions."

April 15.—REES-DAVIES, C. J.: This ship was taken and seized as prize by H. M. S. *Yarmouth* on August 21, 1914, off the Shalientau Island, and was brought to the port of Hongkong. It is now asked that she be condemned as prize.

The defense, as set up on affidavits of the master of the vessel, alleges that she was requisitioned by the government at Tsingtau on the outbreak of the war to carry women and children to Tientsin, as the train service was overcrowded, and the intention was to intern the ship at Tientsin until the end of the war, the ship to be used in the meantime to house such women and children as had insufficient means to live on land. It is also alleged that the ship was specially fitted for this purpose.

The master also states that he had express instructions from the Tsingtau government to fly the German flag and the parliamentary flag (white truce flag) at the foremast, and to carry all lights at night. It is also alleged that the ship was available for any women or children of any nationality, other than Chinese, who might wish to avail themselves of her use, and that no passage money was demanded or paid by the passengers in question.

Under these circumstances it is contended that she was on a "philanthropic mission" within the meaning of article 4 of the Eleventh Hague Convention, 1907, and is exempt from capture.

At the outset of the proceedings I expressed the strongest doubt as to whether it could be so regarded, and the Crown has since fortified me with an extract, under the hand and seal of the assistant undersecretary of state for foreign affairs, of the official report of the committee of the Deuxième Conférence Internationale de la Paix, La Haye, 1907 (Actes et Documents), which, I think, leaves no reasonable doubt as to the construction to be placed on the article in question. It reads (inter alia): "It is obvious that such a favor can only be granted under

the condition that there is no intermeddling (immiscer) in the war operation. In order to avoid all difficulties the power whose ship in question bears the colors must refrain from involving her in any war service." The favor granted to the said ship bestows upon her a sort of neutralization which must last until the end of (all) hostilities, and which must prevent her from having her destination altered."

Now, as to the construction which has to be placed on the foregoing language, I entirely agree with the attorney general's rendering, and will adopt the words which he used in argument. The word "neutralization" here means that the ship is placed entirely outside the pale of any warlike operations, and must in consequence keep herself entirely apart from any service in connection with the war or that may have any effect on the war.

It was contended on behalf of the owners that the intention to intern the refugees at Tientsin was a philanthropic mission, and the recent decision of Mr. Justice Gompertz in the *Hanametal*, (1 B. and C., P. C. 347), a neutral vessel, was relied upon; that the carrying of refugees was not intermeddling with warlike operations, and so was not a breach of neutrality law. I think that there is no real analogy between the reasoning adopted in that case and the present. There is a fundamental difference, as the attorney general contends, between the "neutralization" of an enemy ship within the meaning of the official report on the convention and the neutrality of a nonbelligerent ship. There are many things which the latter may be able to do which in some measure may affect the war without rendering herself liable for a breach of neutrality, and in such case it must be demonstrated to the court by the captor that some unneutral service has been performed. This onus, I understand, is what the Crown failed to discharge in the case of the *Hanametal* (1 B. and C., P. C. 347).

The fact that a neutral ship may carry refugees without being liable to capture does not imply the same power in an enemy ship, although given "une sorte de neutralisation" for the purpose of the philanthropic mission in question. To construe "philanthropic mission" as suggested might lead to serious consequences which clearly could not have been contemplated by the article, and it might enable an enemy vessel to escape to a neutral port under any similar professed act of philanthropy. If it were

intended to cover such an act as the conveyance of noncombatants under such conditions to a neutral port, the convention would not have left it in such vague and indefinite language; and some such system as safe conducts furnished in advance would presumably have been contemplated, as, I understand, has often been the custom in the case of expeditions dispatched for the purposes of science or religion, and in the case of cartel ships.

I may add that, assuming the blockade has existed at Tsingtau (which, I understand, in fact did not exist until August 27), no rule of law exists which obliges a besieging force to allow all noncombatants, or only women, children, the aged, the sick and wounded, or subjects of neutral powers, to leave the besieged locality unmolested. Although such permission is sometimes granted, it is in most cases refused, because the fact that noncombatants are besieged together with combatants, and that they have to endure the same hardships, may, and very often does, exercise pressure upon the authorities to surrender. (See Oppenheim's International Law, vol. 2, p. 193.) This being the case, if the convention ever contemplated such a "philanthropic mission," which in the case of a blockaded port would come directly in conflict with the custom I have stated, it would have provided for it in express and unequivocal language.

The decision I give is that the vessel was properly seized as a prize of war, and that she is subject to condemnation. There will be a decree of condemnation, the Crown to receive such costs as have been occasioned by the claim.

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### THE "SIMLA."

[Admiralty in prize.]

Sir Samuel Evans (the president). May 10, 1915.

1 Trehern, British and Colonial Prize Cases, 281.

CAUSE FOR THE CONDEMNATION OF GOODS SENT BY PARCEL POST.

Statement of case.

The subject-matter of this claim was a number of parcels of miscellaneous goods, consisting of elephant tusks, leopard and snake skins, and curios, sent by parcel post by German colonists in German East Africa, addressed to various persons resident in Germany. The goods were shipped on the German mail steamer *Emir*, which was

captured by a British warship after the outbreak of war between Great Britain and Germany, and was taken into Gibraltar, where she was condemned. The goods in question, of which there were 31 packages, were reshipped in the British steamship *Simla*, and were seized on January 27, 1915, by the collector of customs in the port of London, after the arrival of the *Simla* in the Thames.

Parcel post.

HAROLD MURPHY, for the procurator general. Article 1 of the Eleventh Hague Convention, which provides that "The postal correspondence, whether of neutrals or of belligerents, and whether its character is official or private, found at sea in a ship, whether neutral or enemy, is inviolable," does not apply to parcels sent by parcel post. Herr Kriege, the German delegate at the conference, who proposed this particular regulation, explained that "postal correspondence" was not intended to include parcels. (See Westlake's International Law, volume 2 (2d ed.), p. 185) and Oppenheim's International Law, volume 2 (2d ed.), p. 237.)

SIR SAMUEL EVANS (the president). There is no one here to suggest that these goods are inviolable?

No; there has been no communication at all, and no appearance has been entered.

SIR SAMUEL EVANS (the president). Very well. There is no appearance, and I order that the goods be condemned.

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## THE "SOUTHFIELD."

[Admiralty in prize.]

Sir Samuel Evans (the president). July 5, 15, 1915.

1 Trehern, British and Colonial Prize Cases, 332.

SUIT FOR CONDEMNATION OF CARGO AS PRIZE.

Statement of the case.

On July 16, 1914, the British steamship *Southfield* left Novorossiisk, a Russian Black Sea port, with a cargo of barley shipped by Wülker & Co., a firm of German merchants, and consigned "to order, Emden."

On July 20, one J. R. Heukers, a Dutch merchant, carrying on business at Groningen in Holland, bought 197,000 kilos of the barley and took up the documents on July 27; and, by contracts of sale dated July 24 and 25, one Wilhelm Barghoorn, another Dutch merchant, bought other portions of the cargo amounting to 200,000 kilos, the property in which was transferred to him on

July 29 and 31. Both merchants at once resold to customers of their own.

War broke out between Great Britain and Germany on August 4, and on August 8, when the *Southfield* put into Plymouth, she was diverted to Portsmouth where the cargo was seized as prize. The vessel was then sent round to London where the cargo was discharged and sold, and the proceeds paid into court.

The two Dutch merchants claimed the release of the proceeds of their goods on the ground that they became purchasers before the outbreak of the war, and with no knowledge or expectation of the outbreak of war.

Goods in transitu.

July 15. Sir SAMUEL EVANS (the president). The questions arising for decision depend upon the effect of the intervention of a state of war upon the rights of capture of a belligerent in respect of goods sold by an enemy to a neutral while the goods and the ship in which they are laden are in transitu.

The goods consisted of quantities of barley shipped before the war at a Russian port upon a British ship and consigned to a German port. During the voyage the goods were sold by enemy merchants to neutral merchants—namely, to two Dutch merchants—Heukers and Barghoorn, carrying on business at Groningen. The transactions relating to the sale to Heukers fell within the period from July 20 to July 28, 1914, and those relating to the sale to Barghoorn within the last week in July, 1914. Apart from any question depending upon the intervention of war it is not disputed that the property in the goods had passed to the neutral purchasers before the capture.

Outbreak of war.

The contention of the Crown was that when war was declared between this country and Germany on August 4, 1914, the goods, which were still in transitu, became subject to capture by the Crown, and were confiscable at the time of the capture and seizure on August 8, notwithstanding the prior sales to the neutrals, on the ground that at the time of such sales war was imminent or in contemplation of the enemy vendors.

It is important to examine closely the principle which governs the right of capture of goods transferred in transitu and to ascertain accurately its limits, as it is sometimes apt to be loosely stated.

In order to deduce the rule, it will be sufficient, I think, to refer to two leading cases and to one authorized textbook. I take them in order of date.

Stowell's opinion.

In the *Vrow Margaretha* (1 C. Rob. 336, at p. 337; 1 Eng. P. C. 149, at p. 151) Lord Stowell pronounces upon the subject as follows: "In the ordinary course of things in time of peace—for it is not denied that such a contract may be made and effectually made (according to the usage of merchants)—such a transfer in transitu might certainly be made. It has even been contended that a mere delivering of the bill of lading is a transfer of the property. But it might be more correctly expressed, perhaps, if said that it transfers only the right of delivery; but that a transfer of the bill of lading, with a contract of sale accompanying it, may transfer the property in the ordinary course of things so as effectually to bind the parties and all others can not well be doubted. When war intervenes another rule is set up by courts of admiralty which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist, all goods shipped in an enemy's country would be protected by transfers which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property can not be converted in transitu, and in that sense I recognize it as the rule of this court. But this arises, as I have said, out of a state of war which creates new rights in other parties, and can not be applied to transactions originating, like this, in a time of peace."

Story's opinion.

In the work of Mr. Justice Story on the Principles and Practice of Prize Courts, that celebrated jurist states the rule in the following passage (Pratt's Edition, pp. 64–65): "In respect to the proprietary interests in cargoes, though, in general, the rules of the common law apply, yet there are many peculiar principles of prize law to be considered; it is a general rule that, during hostilities, or imminent and impending danger of hostilities, the property of parties belligerent can not change its national character during the voyage, or, as it is commonly expressed, in transitu. This rule equally applies to ships and cargoes; and it is so inflexible that it is not relaxed, even in owners who become subjects by capitulation after the shipment and before the capture. * * * The same distinction is applied to purchases made by neu-

trals of property in transitu, if purchased during a state of war existing or imminent, and impending danger of war, the contract is held invalid, and the property is deemed to continue as it was at the time of shipment until the actual delivery. It is otherwise, however, if a contract be made during a state of peace, and without contemplation of war; for, under such circumstances, the prize courts will recognize the contract and enforce the title acquired under it. * * * The reason why courts of admiralty have established this rule as to transfers in transitu during a state of war or expected war, is asserted to be, that if such a rule did not exist all goods shipped in the enemy's country would be protected by transfers, which it would be impossible to detect."

Kingsdown's opinion.

Lastly, in the *Baltica* (11 Moo. P. C. 141; 2 Eng. P. C. 628) in the judgment of the lords of the privy council, sitting to hear appeals in prize, Lord Kingsdown (then Mr. Pemberton Leigh) deals with the rule as applicable to ships and goods in the following passages: "The general rule is open to no doubt. A neutral, while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor and vendee is good also against a captor if war afterwards unexpectedly breaks out. But, in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such case a mere transfer by documents which would be sufficient to bind the parties is not sufficient to change the property as against captors as long as the ship or goods remain in transitu.

"With respect to these principles, their lordships are not aware that it is possible to raise any controversy; they are the familiar rules of the English prize courts, established by all the authorities, and are collected and stated, principally from the decisions of Lord Stowell, by Mr. Justice Story, in his Notes on the Principles and Practice of Prize Courts, a work which has been selected by the British Government for the use of its naval officers as the best code of instruction in the prize law. The

passages referred to are to be found in pages 63, 64, of that work.

"In order to determine the question, it is necessary to consider upon what principle the rule rests, and why it is that a sale which would be perfectly good if made while the property was in a neutral port, or while it was in an enemy's port, is ineffectual if made while the ship is on her voyage from one port to the other. There seem to be but two possible grounds of distinction. The one is, that while the ship is on the seas, the title of the vendee can not be completed by actual delivery of the vessel or goods; the other is, that the ship and goods, having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by the belligerent powers until the voyage is at an end.

"The former, however, appears to be the true ground on which the rule rests. Such transactions during war, or in contemplation of war, are so likely to be merely colorable, to be set up for the purpose of misleading or defrauding captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great that the courts have laid down as a general rule that such transfers, without actual delivery, shall be insufficient; that in order to defeat the captors, the possession, as well as the property, must be changed before the seizure. It is true that, in one sense, the ship and goods may be said to be in transitu till they have reached their original port of destination; but their lordships have found no case where the transfer was held to be inoperative after the actual delivery of the property to the owner" (11 Moo. P. C., at pp. 145–146; 2 Eng. P. C., at pp. 630–632).

Transfers in transitu.

It might be argued that according to these authorities transfers in transitu are invalid against belligerent captors upon the intervention of war unless there is actual delivery before capture; or, in other words, that if war has intervened no transfer by documents alone can defeat the right of capture. But, in my opinion, that proposition is too wide, and is not an accurate delimitation of the true rule. In the passages cited Lord Stowell speaks of "a state of war existing or imminent"; Mr. Justice Story of "a state of peace, without contemplation of war," and of "a state of war existing or imminent, and impending danger of war"; and Lord Kingsdown of "war, either actual or imminent," or "war unexpectedly

breaking out" (contrasting it with "a time of peace, without prospect of war"), and of "transactions during war or in contemplation of war."

It is important to note the reasons for the rule which are elaborated by Lord Kingsdown thus [his lordship repeated the passage set out above, beginning "Such transactions during war," and continued]: In my view the element that the vendor contemplated war, and had the design to make the transfer in order to secure himself and to attempt to defeat the rights of belligerent captors, is necessarily involved in the rule which invalidates such transfers. Sales of goods upon ships afloat are now of such common occurrence in commerce that it would be too harsh a rule to treat such transfers as invalid unless such an element existed.

Declaration of London.

I have been considering the rule in its application to the sale or transfer of goods, but it is well to note that special and highly artificial rules as to the transfer of vessels during or preceding a state of war are now laid down in the declaration of London of 1909—as agreed to by the representatives of the powers, and as applied by the orders in council in this country. But these do not apply to goods or merchandise.

As to the facts in these two cases, it is abundantly clear that the neutral purchasers acted with complete bona fides throughout; they paid for the goods, and resold them to neutral customers of their own before war was declared. This would not necessarily conclude the matter.

But I am also satisfied that the vendors did not have the war between their country and this country (to which the ship carrying the goods belonged) in contemplation when they sold the goods. The imminence of war between Germany and Russia has no materiality in considering these cases. In the light of after events, the war with this country may be spoken of as having been imminent, regarded from the point of view of time, in the last two weeks of July; but there is no evidence that it was regarded as imminent in its proper meaning of "threatening or about to occur" by German merchants at that time; not only so, but I find, after investigation in various directions, and on grounds which I deem satisfactory, that it was not in fact so regarded by them. What the hidden anticipation of the Government of the German Empire might have been upon the subject

it is not for me to speculate; but I may express my humble opinion that our intervention in the war upon the invasion of Belgium in defense of treaty obligations, against the breach of such obligations by the invaders, was a complete surprise even to their Government.

Documents and facts which throw light upon the history of the days I have been dealing with between July 24 and August 4, 1914, are, I think, admirably collected and stated in a work called the History of Twelve Days, by Mr. J. W. Headlam.

Decision. On the grounds that the German vendors had no thought of the imminence of war between Germany and this country, and did not have such a war in contemplation at any time while the transactions of sale were taking place or before they were completed, I hold that the sales to the two Dutch merchants were valid, and that the goods were not confiscable. And I decree the release to them respectively of the net proceeds of the sale of their respective goods, which are now in court.

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## THE "GLITRA."

July 30, 1915.

1 Entscheidungen des Oberprisengerichts, 34.

In the prize matter concerning the English steamer *Glitra*, with Leith as her home port, the imperial superior prize court in Berlin, at its sitting of July 30, 1916, has found as follows:

Decision. The appeals lodged by the plaintiffs under Nos. 9 to 12 of the decision are rejected as inadmissible; the appeals of the remaining plaintiffs are denied as unfounded.

The costs of the proceedings in appeal are to be borne by the plaintiffs.

### REASONS.

Statement of the case. On October 20, 1914, the steamer *Glitra*, belonging to the firm of Salversent & Co., of Leith, with a general cargo on the way from Leith to Stavanger, was brought to by a submarine, and after the crew had left the ship she was sunk, together with her cargo.

German prize regulations. In answer to the summons of the prize court issued in accordance with section 26 of the prize court regulations, the 13 parties interested in the cargo submitted claims for compensation for damages due to the destruction of their merchandise. The plaintiffs are members of Norwegian firms; the plaintiff figuring in claim No. 2 alone

is a Danish insurance company which presents the claims of its Norwegian policyholders.

The prize court has found that the ship which was sunk was subject to seizure and has denied the claim.

The appeal lodged against this decision is not well founded.

Destruction necessary.

The prize court has, in the first place, impartially established that the *Glitra* was an English ship, and that, given the circumstances of the case, the destruction of the ship was necessary, in order to insure the capture. The prize court did not concern itself with the question as to whether or not the merchandise, on account of which claims for compensation were submitted, was neutral merchandise, because it came to the conclusion that even if such had been the case there would be no cause for a claim to compensation for damages. In justification of this conclusion it was stated that the question thus brought up had not been decided either in the prize regulations or in any international treaties, and, especially, it had not been decided in the London declaration, as is evidenced by its text and the history of its origin. It was said that opinion had been divided. It was stated that by the French memoir neutral cargoes were not entitled to claims for damages, because, when the captor, for military reasons, holds the destruction of the prize to be necessary, such a situation presents a military measure; while, on the other hand, the English memoir admits the claim, provided the case does not involve contraband, because a permissible cargo on board an enemy ship is not subject to seizure. The question formulated as a guide for the preliminary discussion:

Declaration of London.

Neutral merchandise.

In view of the principle that neutral merchandise under enemy flag is not subject to seizure, will the owner of the merchandise, in case of the destruction of the ship, have to be indemnified, or is, in such case, the destruction of a ship a military action which does not obligate the belligerent to make indemnification?

had been discussed without bringing about an understanding. The prize court observed that during these negotiations the question mainly dealt with was the admissibility of the destruction of *neutral* ships, subject to seizure. Confining herself to this particular matter, Germany had expressed herself in favor of compensation for neutral goods not subject to seizure. Japan alone had declared herself with regard to the matter of neutral mer-

chandise on an *enemy ship* which was destroyed, and that in the sense of England. Nothing indicated that, as matters stood, Germany had meant to establish in the prize regulations a principle to the effect that when an *enemy ship* was destroyed, the neutral cargo was entitled to a claim for indemnification. In this sense at most an argument could be deduced from article 114 of the prize regulations, in so far as it was here presupposed that in destroying any ship compensation must be made for the incidental destruction of that part of the cargo not subject to seizure. The argument was considered, however, not sufficiently conclusive. It might readily be assumed that article 114 referred only to the destruction of *neutral ships*, in view of the fact that the preceding and the following provision of the prize regulations dealt only with such case.

Indemnification.

This view must, in effect, be approved.

German prize regulations.

The question to be settled is as to whether or not in case an enemy ship is lawfully destroyed, compensation must be made for neutral merchandise on board such ship which is destroyed at the same time. It is clear that neither the prize regulations nor the London declaration, contains an express prescription in regard to this matter. Nor has the prize regulation indirectly provided for the settlement of that matter. The plaintiff believes that such a provision is found in No. 114 of the prize regulations. The judge of first instance has justly denied this, although we can not absolutely agree with him in all the reasons he gives anent this matter. In the article referred to the commander is directed, before proceeding with the destruction of a ship, to see if the loss thereby accruing to the enemy is equivalent to the compensation for damages which must be paid for that part of the cargo not subject to seizure which is destroyed at the same time.

Destruction.

In connection with this, reference is made, between brackets, among other things to article 18 which deals with the seizure of *enemy ships* and states which part of the cargo is, at the same time, subject to seizure. This in effect, looks as though the author of the prize regulations had, when dealing with article 114, thought that in the case of the destruction of an *enemy ship* compensation must be made for the part of the cargo not subject to seizure; it must also be admitted that the said reference is opposed to the course of reasoning followed by

the first instance when it assumes that article 114, even as the preceding and the following provision, dealt only with the destruction of neutral ships. In spite of that, however, the provision can not be given such scope of interpretation as that with which the plaintiffs meant to endow it. If it were so understood, it would come into a certain material contradiction with that which the prize regulation prescribes in the immediately connecting article. As can be clearly seen from this, the prize regulation does not hold that, in every case compensation must be made for the destruction of merchandise not subject to seizure. In the case of the lawful destruction of a neutral ship, compensation is prescribed for the merchandise, not subject to seizure, destroyed along with the ship, in so far as this concerns neutral merchandise, but not in regard to enemy merchandise, although likewise not subject to seizure, under the protection of the neutral flag. We must, furthermore, bear in mind that there are also enemy ships that are not subject to seizure, and, therefore, not subject to destruction, so that, even although at some time—possibly by reason of a pardonable error—the destruction took place, it may yet be asked, whether or not a distinction should be drawn in regard to compensation for values destroyed along with the ship, between neutral and enemy merchandise, and for this reason it might have seemed advisable to direct the commanders of vessels, for such eventualities, to make the inquiry incumbent upon them according to article 114. But it is above all important to remember that article 114 is not *sedes materiae* and that, therefore, even assuming that the author of the law thought that even in case of the lawful destruction of an enemy ship claims for compensation could be presented in behalf of the merchandise of neutrals, it would be wrong to find therein a positive decision of this at least doubtful, and at all events very controverted question which, although discussed at the London Conference, was left open.

Positive law.

As Wehberg points out in Oesterreich. Zeitschrift für öffentliches Recht, Tome II, 3, page 282, Heilfron, Jur. Wochenschrift, 1915, page 486, goes too far when he attributes to the prize regulations only the importance of an order promulgated by the Emperor to the naval authorities. The prize regulations contain, to a large extent, positive law. But, with regard to the provision now under consideration, Heilfron's characterization fits

perfectly. This article 114 is, in effect, but an order to the commanders of ships. Through it only the war lord speaks, and not the legislator. It is not its purpose to establish material right and it does not do so.

Law of warfare.

If, therefore, we are compelled to consider the most general principles of law in connection with the rules of the general law of warfare, it is found with absolute certainty that neutrals are not entitled to present a claim in case the destruction of the prize was, in the circumstances, justified (art. 112 of the prize regulations). The bringing to and the capture of the enemy ship is a lawful war measure against the foreign State, approved in international law. Claims for damages, either on the part of the nationals of enemy States or on the part of neutrals can not in all such cases be upheld. To be sure, according to article 3 of the Paris declaration, neutral merchandise (that is not contraband) is not subject to capture even on board an enemy ship. It is, therefore, not subject to seizure in case the prize is taken to port. But there is no suggestion that the parties interested in the cargo are entitled to present claims for compensation for damages that have arisen as a result of the ship being taken to port, of an interruption in the trip or the taking of the ship to another than the point of destination. Nor is it legitimate to present a claim for compensation in case the merchandise itself, as a result of the seizure of the ship, has sustained damage, nor, for instance, if on the further journey of the prize it is lost as a result of an accident at sea. Since the seizure is a lawful act, there is no legal principle on which a claim may be presented for the damage which the neutral has rather caused himself by intrusting his merchandise to a ship exposed to danger. Therefore, the war measure being lawful, there is no legal ground on which a claim for damages may be based in case the merchandise is lost because the war operation directed against the ship was, according to the circumstances, necesssarily directed against her cargo as well.

Damages.

The legal question that is important in this matter may arise even in the course of warfare on land. Conditions may be such and very frequently will be found to be such that, for instance, while bombarding a fortified or defended place, the property of neutrals is damaged. But even in warfare on land where private property is protected to a greater extent than in naval warfare, there

is no question of a duty on the part of the belligerent State, in such cases, to make compensation even to neutrals (art. 3 of the fourth convention of the Second Hague Conference).

Compare Geffcken in Heffter, Völkerrecht, 8th edition, §150, note 1 (incorrect, at least inadequate in that text of Heffter).
Calvo, Droit International, 4th edition, Vol. IV, §§ 2250–2252.
Bonfils, Droits des gens, 1908, § 1217.
Bordwell, Law of War, 1908, p. 212.

Declaration of Paris.

As regards the conditions of naval warfare in particular there is no protection either general or specific afforded to neutral merchandise by article 3 of the Paris declaration against the acts of the belligerent party resulting from the circumstances of the war. Article 3 referred to above is intended to afford protection against the prize law to which, up to the time of the Paris declaration, neutral merchandise in the enemy ship was exposed. Whatever the circumstances of the war demand, must be permitted to take place without regard to the fact that neutral merchandise is on board the ship. If, according to article 2 of the Paris declaration, the neutral flag protects enemy merchandise, this does not mean that vice versa the enemy ship is to be protected by neutral merchandise, protected in the first place, perhaps only against destruction, but by the same token in innumerable cases against any exercise of the prize law.

As far as can be ascertained, no one has disputed this even down to the most recent times.

Compare Resolutions of the French Conseil d'Etat, May 21, 1872.
Dalloz, Jurisprudence générale, 1871, III, No. 94, in the prize matter *Ludwig and Vorwärts*.
Dupuis, Le Droit de la guerre maritime, 1899, p. 334.
de Boeck, De la propriété ennemie privée sous pavillion ennemi, 1882, §146.
Bordwell, Law of War, 1908, p. 226.
Wheaton, International Law, 4th edition, p. 507, §359.
Oppenheim, International Law, second edition, Vol. II, p. 201 ff.
Calvo, Droit International, 4th edition, Vol. V, §§3033, 3034.
Hall, International Law, 5th edition, p. 717 ff.

French prize court decisions.

The assertion of the plaintiffs that the decision of the French prize court in the matter of the *Ludwig* and the *Vorwärts* had been almost unanimously attacked in the literature, has, apart from the quotations adduced from the most recent sources (Wehberg and Schramm; the quotation from Hall, p. 187, see above, is incomprehensible), not been supported by documents, and must,

therefore, be regarded as incorrect. Only in the most recent times, especially in Germany, has there arisen a conception of the theory which postulates the obligation to make compensation as a basic principle in all cases of the destruction of merchandise not subject to seizure generally or only in so far as neutral merchandise is concerned.

Compare, Schramm, Prisenrecht, 1913, p. 338 ff.

Wehberg, Seekriegsrecht, 1915, p. 297, notes 3 and 4; and Oesterr. Zeitschrift für offentliches Recht., cited elsewhere.

Rehm, Deutsche Juristenzeitung, 1915, p. 454.

In all these sources the general obligation for making compensation in the above sense is unmistakably felt to be something to be taken for granted. The foundation is lacking and where it is subsequently sought to establish one, it does not appear convincing when compared with the explanations given above. Nor can anything be done against the conclusiveness of the latter expositions by pointing out that warfare on land remains locally circumscribed to the national territory of the belligerents, while the ship sails the open seas. The fact that an enemy ship on the high seas is subject to seizure, and, if necessary, to attack, rests on the condition of international law as it exists, a condition which is to be deplored, but which is, nevertheless, a condition of fact. In all other respects, so soon as the ship is on the high seas, she is a part of the territory of her State, in which the neutral, by a voluntary act on his part, has placed his merchandise, by lading it on a vessel of a belligerent country for the purpose of transportation across the sea.

German prize regulations.

In conclusion, it should be stated that it is not a defect of procedure when, as is stated in the appeal, the prize court has refrained from deciding as to whether or not the merchandise, to which the claims refer, was subject to seizure. It is the object of section 1 of the prize court regulations clearly to define the prize jurisdiction, and even although in section 2 it is prescribed to what the decision is to extend, this means that thereby a line has been drawn to which the courts must confine themselves; but nowhere is it prescribed that in any particular case a decision must be handed down with regard to the said questions even when the settlement of the claims presented does not depend thereon.

Notwithstanding the summons issued under 9 and 12, the plaintiffs have not deposited the amount necessary to cover expenses. Their legal remedy was, therefore, not to be dealt with.

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## THE "DACIA"

*vapeur capturé en mer le 27 février 1915 par le croiseur auxiliaire Europe.*[29]

CONSEIL DES PRISES.

Décision des 3 et 5 août 1915.

[1916] Décisions du Conseil des Prises, 180.

AU NOM DU PEUPLE FRANÇAIS,

Le Conseil des Prises a rendu la décision suivante, entre:

D'une part, Edward Breitung, domicilié à Marquette (Michigan, États-Unis), se disant propriétaire du vapeur *Dacia*, capturé en mer le 27 février 1915, à l'entrée de la Manche, par le croiseur auxiliaire français *Europe*, ensemble le capitaine dudit vapeur, et le Ministre de la Marine agissant pour le compte des capteurs et de la Caisse des Invalides de la Marine.

Documents.

D'autre part, vu les lettres et bordereaux du Ministre de la Marine des 30 mars, 29 avril, 15 juillet et 26 juillet 1915, enregistrés au Conseil les 29 avril, 16 et 29 juillet 1915, portant envoi du dossier concernant la capture du vapeur *Dacia* et concluant à ce qu'il plaise au Conseil déclarer bonne et valable la capture du *Dacia* et de tous ses accessoires, parmi lesquels les approvisionnements de bord de toute nature, y compris les vivres sans exception, trouvés sur le navire, même ceux réclamés comme propriété personnelle par le capitaine MacDonald, en dehors des papiers de bord;

Vu les documents constituant ledit dossier, et notamment:

1° Le procès-verbal de capture dressé en mer le 27 février 1915;

2° Les papiers de bord, parmi lesquels un acte en date à New-York du 17 décembre 1914, par lequel la Compagnie Hamburg-Amerika déclare vendre le *Dacia* à Edward N. Breitung, et un affidavit du 19 décembre 1914 dudit Breitung déclarant cette vente sincère et sans réticences; l'acte d'enregistrement américain dudit *Dacia* à Port-Arthur (Texas), le 4 janvier 1915; le manifeste de

[29] Décision insérée dans le Journal officiel du 28 septembre 1915.

chargement et les connaissements en date à Galveston (Texas) du 22 janvier 1915; le livre de bord du *Dacia;*

3° Deux conventions en date des 9 décembre 1914 et 17 janvier 1915 concernant l'affrètement du *Dacia* en vue du transport de sa cargaison;

4° Les pièces concernant la cargaison, parmi lesquelles les contrats de vente et transport de ladite cargaison passés à Brême les 10 et 12 décembre 1914, ensemble les factures en date du 29 décembre 1914 et la police d'assurance du risque de guerre du 22 janvier 1915;

Vu les mémoires et observations complémentaires et additionnelles présentés par M^e^Morillot, avocat au Conseil d'État, enregistrés au Conseil les 12 mai, 13 et 28 juillet 1915, au nom de Edward N. Breitung, se disant propriétaire du *Dacia,* concluant à ce qu'il plaise au Conseil: ordonner dès à présent la libération du *Dacia* moyennant une caution que le Conseil arbitrera, mais dont le chiffre ne saurait en aucun cas dépasser 870,000 francs; déclarer valable, par application de l'article 56 de la Convention de Londres, le transfert du *Dacia* effectué du pavillon allemand au pavillon américain suivant les règles de la loi américaine; annuler la capture du *Dacia,* déclaré propriété neutre, libérer le navire et restituer les approvisionnements et accessoires divers saisis en même temps que le navire; lui allouer la somme de 300,000 francs à titre de dommages-intérêts pour le préjudice qui lui a été causé par la capture injustifiée de son navire, par application de l'article 64 de la Déclaration de Londres; lui allouer une somme à fixer ultérieurement, représentant le fret de la cargaison et les surestaries encourues par les chargeurs de ladite cargaison;

Vu les documents annexés auxdits mémoires et, parmi eux, un affidavit de W. Sickel, directeur à New-York de la Compagnie Hamburg-Amerika, en date du 13 mai 1915, ensemble un acte de vente du 16 décembre 1914, par lequel celui-ci vend à Egon von Novelly ledit *Dacia,* et un acte de cession de Egon von Novelly à Breitung;—le document du congrès des États-Unis intitulé 63^e^ congrès, 2° session; Sénat, n° 563, contenant l'opinion de l'honorable Cone Johnson, solicitor pour le Département d'État, concernant le transfert des navires de commerce pendant la guerre;

Vu les conclusions écrites du commissaire du Gouvernement, tendant à ce qu'il plaise au Conseil décider que la capture du vapeur *Dacia,* de ses agrès, apparaux, arme-

ment et approvisionnements de toute nature, effectuée le 27 février 1915, par le croiseur auxiliaire *Europe*, est déclarée bonne et valable, pour la valeur du navire être attribuée aux ayants droit, conformément aux lois et règlements, et qu'il sera restitué au capitaine et à l'équipage leurs effets personnels ne constituant pas des articles de cargaison ni de pacotille;

Vu les autres pièces jointes au dossier;

Vu la notification publiée au *Journal officiel* du 10 avril 1915, ensemble les décisions rendues avant faire droit par le Conseil, les 11 mai et 8 juin 1915 et accordant, sur la demande de l'ambassadeur des États-Unis, de nouveaux délais à Edward N. Breitung pour la production de ses observations;

Vu les arrêtés des 6 germinal an VIII et 2 prairial an XI;

Vu les décrets des 9 mai 1859 et 28 novembre 1861;

Vu la Déclaration du Congrès de Paris, du 16 avril 1856;

Vu le décret du 6 novembre 1914 déclarant applicable au cours de la présente guerre la Déclaration signée à Londres le 26 février 1909;

Ouï M. Henri Fromageot, membre du Conseil, en son rapport, et M. Chardenet, commissaire du Gouvernement, en ses observations à l'appui des conclusions ci-dessus visées;

Statement of the case.

Le Conseil, après en avoir délibéré, considérant que, le 27 février 1915, le croiseur auxiliaire français *Europe* a rencontré et semoncé en haute mer, à l'entrée de la Manche, le vapeur *Dacia* battant pavillon américain et déclarant se rendre de Norfolk (Virginie, États-Unis) à Rotterdam (Pays-Bas); que l'examen des papiers du bord et la visite ayant fait constater que le navire, transportant une cargaison chargée à Galveston (Texas) à destination de Brême (Allemagne), était, au début des hostilités et jusqu'au 4 janvier 1915, sous pavillon allemand, enregistré à Hambourg (Allemagne) au nom de la Compagnie allemande "Hamburg-Amerika", ledit navire a été capturé comme inhabile à se prévaloir d'un transfert sous pavillon neutre opéré au cours de la guerre;

Considérant qu'Edward Breitung, invoquant l'article 56 de la Déclaration de Londres de 1909, soutient que l'État français est mal fondé à méconnaître le pavillon neutre porté par le *Dacia*, le transfert du navire sous pavillon américain n'ayant pas, selon lui, été effectué en

vue d'éluder les conséquences qu'entraînait pour ledit navire son caractère de navire ennemi;

Qu'il prétend faire cette preuve en soutenant que ledit transfert aurait été motivé par un intérêt sérieux et légitime résultant de ce que:

Nationality. 1° On ne saurait le considérer, n'étant pas Allemand naturalisé Américain et se livrant, selon lui, à des affaires considérables, comme un prête-nom de la Compagnie Hamburg-Amerika;

2° Dès avant la guerre il aurait songé à créer des lignes de navigation;

3° Il aurait eu des pourparlers en vue d'acquérir certains navire autres que le *Dacia* et ne battant pas pavillon allemand;

4° Postérieurement à sa prétendue acquisition du *Dacia*, il aurait continué à s'occuper d'affaires maritimes et acheté d'autres navires;

5° Il a déclaré sous la foi du serment: "J'ai acheté le *Dacia* dans le cours normal de mes affaires maritimes. Mon unique but en faisant cette acquisition fut de me procurer à un prix satisfaisant une chose dont j'avais besoin."

Sale. Qu'Edward Breitung produit notamment à l'appui de ses dires: un acte non signé de lui en date du 17 décembre 1914, ledit acte figurant parmi les papiers de bord par lequel la H. A. L. déclare lui avoir vendu la totalité de ses droits, propriété et intérêts sur le vapeur *Dacia*, tenir ledit vapeur à sa disposition pour son usage exclusif et propre, le garantir de toutes réclamations contre ou sur le navire *Dacia* pour quelque cause ou objet que ce soit, et s'engage à lui garantir que ledit navire est libre de toute charge, de toute nature ou espèce; une copie de l'affidavit remis au Gouvernement des États-Unis préalablement à l'admission à l'enregistrement sous pavillon américain et par lequel Breitung déclare, comme acheteur désigné dans l'acte ci-dessus, notamment que la cession du navire a été faite de bonne foi, qu'elle est complète, sans réserve aucune ni convention de reméré;—et, d'autre part, un affidavit en date du 13 mai 1915, par lequel W. Sickel, directeur de la H. A. L. à New-York, déclare sous serment qu'en dehors de la vente du navire, il n'y a eu ni stipulation ni conventions quelconques entre la ligne hambourgeoise américaine, ayant rapport au transfert ou à l'usage du navire ou la restreignant, qu'enfin la vente

n'a pas été faite pour éluder des conséquences de l'état de guerre;

En fait:

Considérant que le *Dacia*, de la H. A. L. était avant les hostilités habituellement affecté, d'après le réclamant, au trafic entre les ports allemands et les ports du golfe du Mexique; qu'en effet, il était parti, en dernier lieu de Hambourg, le 17 juin 1914, pour Newport-News (Virginie, États-Unis); que le 28 juillet il se rendait à Port-Arthur (Texas), et qu'au moment de la déclaration de guerre, il restait immobilisé dans ce port, au lieu d'effectuer son voyage de retour sur l'Europe; qu'il est manifeste que le navire, comme un grand nombre d'autres navires de la même compagnie, a ainsi subitement rompu son trafic pour éviter la capture; que le navire étant dans cette situation et restant inutilisé, la H. A. L. essaya de le vendre;

Considérant que par un affidavit, en date à New-York (États-Unis) du 15 avril 1915, un sieur Egon von Novelly, déclare sous serment que le 7 décembre 1914 il aurait signé et remis à W. Sickel, directeur à New-York de la H. A. L. un engagement ainsi conçu: "Je vous fais une offre ferme de $165,000 pour le vapeur *Dacia* actuellement dans le port de Port-Arthur (Texas), y compris son armement. Cette offre est subordonnée à l'obtention par vous de la permission du Gouvernement des États-Unis de placer le navire sous pavillon américain. J'ajoute et je déclare sous serment que ce navire sera employé à transporter du coton, ou autre marchandise de non-contrebande, en Allemagne ou en Autriche, ou dans d'autres pays neutres."

Que W. Sickel, par un affidavit, en date à New-York (États-Unis) du 11 juin 1915, déclare sous serment n'avoir jamais reçu cette lettre;

Que, quoi qu'il en soit de ces affirmations solennelles contradictoires, il est établi par un document en date du 9 décembre 1914 figurant au dossier qu'à ladite date du 9 décembre, c'est-à-dire le surlendemain de l'engagement contesté ci-dessus rappelé, Egon von Novelly a passé une convention d'affrètement avec les sieurs L.-A. Wight et C°. représentant un sieur Tom B. Owens de Fort Worth (Texas), en vue du transport par le *Dacia* d'une cargaison de coton de Galveston à Brême et ainsi conçue:

"E. von Novelly et C° mettront à la disposition le vapeur *Dacia*, actuellement sous pavillon allemand et appar-

tenant à la H. A. L., pour le transport de 11,000 balles de coton de Galveston (Texas) à Brême (Allemagne). E. von Novelly et C° auront le vapeur sous enregistrement du Gouvernement des États-Unis et sous pavillon américain. E. von Novelly et C° auront ledit vapeur à Galveston (Texas) au mois de décembre 1914 et garantiront le départ le ou avant le 15 janvier 1915. Le navire sera en conditions convenables pour transporter ledit coton. Le navire ne sera pas assuré au Gouvernement des États-Unis contre le risque de guerre, sauf pour l'excédent qu'il y aurait en plus de $750, 000, somme cotée par le Gouvernement des États-Unis pour le risque de guerre sur la cargaison. Fret payable à la signature des connaissements au taux de 3¢ par livre. E. von Novelly et C° auront droit de prendre, pour leur propre compte et pour le compte d'autres personnes, un nombre additionnel de balles (n'excédant pas au total la capacité du navire) et ledit nombre additionnel de balles ne préjudiciera pas à l'assurance des 11,000 balles de MM. Tom B. Owens et C°. L.-A. Wight et C° feront tous leurs efforts sans préjudice pour pourvoir à l'assurance, marine et guerre, du surplus des 11,000 balles. Signé: E. von Novelly et C°; Wight et C°, comme représentants de Tom B. Owens et C°."

Qu'il est également établi que les 10 et 12 décembre 1914, suivant une série de contrats passés à ces dates à Brême, par Tom B. Owens et C° et un sieur Harold von Linstow, de Brême, déclarant agir pour compte de divers intéressés allemands de cette même place, 11,000 balles de coton ont été vendues par ledit Tom B. Owens et C° audit Harold von Linstow pour compte, avec stipulation de transport direct ou indirect par le vapeur *Dacia*, à charger jusqu'au départ le 15 janvier, chargement à effectuer par Galveston (Texas) pour Brême; ladite vente conclue, coût, assurance, fret, payement garanti par les banques allemandes "Deutsche Bank" et "Diskonto-Gesellschaft";

Que le 16 décembre 1914, suivant un contrat annexé à l'affidavit du directeur de la H. A. L. du 13 mai 1915 précité, ladite compagnie allemande, propriétaire du *Dacia*, déclara à von Novelly (que tous les renseignements produits par Breitung, 3e mémoire, p. 5, représentent comme un "promoteur d'affaires fictives," sans aucune solvabilité et avec lequel aucun armateur ne pouvait sérieusement contracter):

"Par ces présentes nous confirmons notre convention de vous vendre pour livraison immédiate notre vapeur *Dacia* se trouvant à présent à Port-Arthur (Texas), aux termes et conditions suivantes: le prix d'achat du navire est de $165,000, en plus le prix de revient actuel de tout équipement mobile à bord, charbon, vivres et fournitures dont l'inventaire du tout sera fait immédiatement. Vous devez nous verser aujourd'hui 10 p. 100 de la somme ci-dessus spécifiée, soit 16,500 dollars; en plus vous vous engagez à payer le solde du prix d'achat en 7 jours de la date de cette lettre. En plus, il est entendu et convenu qui si vous échouez dans votre demande en vue d'obtenir l'enregistrement américain pour le navire, nous vous rendrons toutes sommes que vous nous aurez payées."

Que ledit contrat porte l'agrément exprès de Egon von Novelly; qu'il est suivi d'une cession de tous droits par ledit von Novelly à Edward N. Breitung;

Que dans un affidavit, en date à New-York du 22 mars 1915, le directeur de la H. A. L. déclare sous serment n'avoir appris que plus tard cette cession et n'avoir jamais recontré Edward N. Breitung ou lui avoir parlé;

Que le prétendu acte de vente, daté du 17 décembre 1914, déposé entre les mains des autorités des États-Unis, mis à bord et invoqué par Breitung, présente ce dernier comme le co-contractant de la H. A. L., que cet acte n'est pas signé de lui, ni de personne pour lui;

Considérant que les 16 et 21 décembre 1914, d'après des documents annexés en copie à un exposé fait par Breitung au Sénat des États-Unis (63e congrès, 3e session, Sénat, doc. nº 979, p. 15), un sieur Max Breitung aurait remis à la banque "Guarantee Trust et Cº" de New-York, au profit de la H. A. L., deux chèques s'élevant au total à $165,000; que se versement correspond, comme montant et comme date, au prix convenu pour le *Dacia* et stipulé remboursable à défaut de transfert sous pavillon américain; que, d'autre part, il résulte des factures de Tom B. Owens, en date à Fort Worth (Texas) du 19 décembre 1914, et s'élevant coût, assurance et fret à $727,762.98; qu'à cette date Owens adressa à la banque dite "Guarantee Trust Cº" de New York, pour compte desdites banques allemandes "Deutsche Bank" et "Diskonto Gesellschaft" ses traites en payment du

coton par lui vendu c. a. f. à Brême et à transporter par le *Dacia*;

Qu'Owens remit effectivement à ladite "Guarantee Trust C°" les factures, connaissements et polices d'assurances; que ladite banque lui aurait versé 75 p. 100 de la valeur;

Que ladite vente impliquait la transmission de la propriété de la marchandise aux acheteurs allemands dès l'embarquement, sous réserve du droit de gage garantissant la créance de la "Guarantee Trust C°" en remboursement du prix dû par les intéressés allemands;

Registration.

Considérant que c'est dans ces conditions que le 4 janvier 1915, le *Dacia*, déclaré appartenir à Edward N. Breitung, fut enregistré à Port-Arthur (Texas), suivant certificat temporaire daté desdits port et jour; que le 7 janvier le navire était conduit à Galveston (Texas), où, dès le lendemain, il commencait à charger la cargaison de coton dont il a été parlé ci-dessus; que le 17 janvier, intervenait entre Breitung et Owens un accord concernant notamment les délais supplémentaires de chargement et les conditions du déchargement; que, le 21 janvier, il avait achevé son chargement; qu'à cette même date une assurance contre le risque de guerre était stipulée au profit de la "Guarantee Trust C°" pour $715,000; que le 22 janvier étaient signés les connaissements portant en marge la mention du fret payé d'avance, s'élevant au total, d'après le manifeste de chargement, à la somme de $172,669, somme supérieure de $7,669 à la valeur payeé pour prix du navire, et qu'enfin, après une attente de plus d'une semaine apparemment occupée, d'après le livre de bord, à des envois d'odres et instructions particulières et, d'après Breitung, à un retard au sujet du fret, le navire prenait la mer le 31 janvier 1915 pour aller charbonner à Norfolk, y prendre ses expéditions défintives et partir de là pour l'Europe;

Considérant que Breitung fait remarquer dans son mémoire, que le navire était documenté pour Rotterdam (Pays-Bas) et non pour Brême;

Mais, considérant que le manifeste de chargement mentionne expressément que la cargaison était bien pour Brême et que les connaissements portent l'indication de notifier l'arrivée à H. von Linstow à Brême;

Qu'ainsi il n'est pas douteux que le voyage du *Dacia* et sa cargaison aient été ceux prévus dès le 9 décembre

1914; que, dès le départ du navire, Breitung était remboursé, sous forme de fret, du prix payé par lui pour le navire et que le chargeur Owens était lui-même tout à la fois payé et remboursé jusqu'à concurrence de 75 p. 100 de sa créance pour prix de la cargaison et dudit fret par la "Guarantee Trust C°" agissant pour compte des intéressés allemands; que, par conséquent, les interêts engagés dans l'expédition étaient, jusqu'à concurrence de 75 p. 100, des intérêts allemands, sauf le droit de privilège de la "Guarantee Trust C°" sur la cargaison, à raison des sommes payées par cette banque pour le compte des banques allemandes ci-dessus indiquées;

Considérant que le 27 février 1915, au moment de sa capture, le *Dacia*, accomplissait donc, grâce à un transfert sous pavillon américain, spécialement obtenu à cette fin, le transport d'une cargaison destinée à Brême (Allemagne) en exécution de conventions passées au profit d'intérêts allemands, alors que le navire était sous pavillon allemand, et subordonnés à la condition que ledit navire serait transféré sous pavillon américain;

En droit:

Considérant qu'aux termes du décret du 6 novembre 1914 (Journal officiel, 7 novembre 1914), article 1er, la Déclaration signée à Londres, le 26 février 1909, relative au droit de la guerre maritime, a été déclarée applicable durant la guerre actuelle, sous réserve de certaines additions et modifications étrangères à la cause; Declaration of London.

Qu'aux termes de ladite Déclaration, article 56, "le transfert sous pavillon neutre d'un navire ennemi, effectué après l'ouverture des hostilités, est nul à moins qu'il soit établi que ce transfert n'a pas été effectué en vue d'éluder les conséquences qu'entraîne le caractère de navire ennemi";

Qu'il est réciproquement reconnu par les parties que c'est là la seule loi applicable dans l'espèce;

Que, d'ailleurs, la Déclaration de Londres de 1909, n'ayant pas été ratifiée, a purement et simplement la valeur de dispositions intérieures dont l'interprétation appartient au Conseil;

Que Breitung prétend établir que le transfert du *Dacia* sous pavillon américain n'a pas été effectué en vue d'éluder les conséquences qu'entraînait pour lui le caractère de navire ennemi, en alléguant l'intérêt sérieux et légitime qui, selon lui, aurait motivé son acquisition Transfer of ship.

et résulterait des considérations, faits et documents par lui produits et ci-dessus rappelés;

Mais considérant que ni la nationalité ni la position commerciale de Breitung, ni ses prétendues spéculations non plus que le but, qu'il soutient avoir poursuivi, d'acquérir à un prix satisfaisant une chose dont il avait besoin, ne constituent dans l'espèce une preuve suffisante que le transfert du *Dacia* sous pavillon américain n'a pas été effectué pour éviter au navire le risque de capture; qu'aucune de ces allégations de Breitung ne porte sur les conditions dans lesquelles la H. A. L., en ce qui la concerne elle-même, a cherché à vendre et a vendu le *Dacia;* qu'à cet égard, la simple affirmation de son directeur selon laquelle il aurait vendu parce que le navire était vieux, est une preuve insuffisante, alors qu'il est établi d'autre part que le navire était inutilisé par suite du risque de capture et que le transfert sous pavillon américain a été la condition de son affrètement et de sa vente;

Considérant que, d'après le réclamant, la preuve de la réalité et de la sincérité du transfert et l'existence d'un intérêt sérieux pour l'acquéreur suffiraient à rendre le transfert sous pavillon neutre opposable au belligérant;

Que le réclamant invoque à cet égard une opinion donnée par l'honorable Cone Johnson, solicitor du Département d'État des États-Unis, le 7 août 1914, d'après lequel l'article 56 de la Déclaration de Londres devrait s'entendre en ce sens que "la vente d'un navire belligérant à un neutre en temps de guerre est valable lorsque ladite vente est faite de bonne foi et dépouille le vendeur de tous titre et intérêts" (63e congrès, 2e session; Sénat, document n° 563, p. 88); que selon M. Cone Johnson, la Déclaration de Londres n'aurait fait que "confirmer et consolider la position prise depuis longtemps par les États-Unis, la Grande-Bretagne et la plupart des autres nations maritimes, excepté en ce qui concerne le fardeau de la preuve de la bonne foi d'un tel transfert fait pendant la durée de la guerre. C'est la bonne foi de la vente qui est l'essence d'un transfert valable et on ne peut pas découvrir que les motifs ultérieurs qui ont pu pousser les parties à faire ce transfert aient une action sur cette validité, quoique, bien entendu, ces motifs puissent très bien avoir été les avantages qui vont tout naturellement résulter du fait que le navire arborera un pavillon neutre

au lieu du pavillon de son pays qui est en guerre. Si le transfert est de bonne foi sans contre-lettre, ou résulte de propriété ou intérêt sans aucune convention que le navire sera retransféré à la fin des hostilités et sans autre signe d'un transfert simulé ou fictif, s'il ne s'agit pas d'un navire dans un port bloqué ou en cours de route, le transfert est valable d'après le droit international comme il l'est d'après la Convention de Londres, quoique les motifs ultérieurs du vendeur et de l'acheteur puissent très bien avoir été les avantages naturels du fait d'arborer le pavillon d'un État en paix."

Mais, considérant que si, lors des travaux préparatoires de l'article 56 de la Déclaration de Londres, certaines propositions avaient été faites tendant à subordonner uniquement à la bonne foi la validité des transferts de pavillon au regard des belligérants, une divergence de vue s'était manifestée au sujet de la signification du terme "bonne foi" proposé comme criterium de la validité; que la délégation des États-Unis paraissait admettre que la bonne foi existait si le contrat relatif au transfert était sincère et définitif et ne comportait rien de fictif ou d'irrégulier; tandis que les propositions allemande et britannique entendaient par bonne foi l'absence parmi les motifs du transfert, de l'intention de soustraire le navire à l'effet du droit de capture; qu'à cet égard, d'après ces propositions, comme d'après le texte original proposé à l'adoption de la Conférence navale de Londres sous le n° 35 des bases de discussion, le transfert ne pouvait être reconnu valable que s'il y avait lieu de croire qu'il aurait été aussi bien effectué si la guerre n'était pas survenue (Bl. Book, p. 183 et 260);

Que c'est dans ce dernier sens que se sont prononcés les rédacteurs de la Déclaration de Londres en adoptant le texte de ladite base de discussion, tout en mentionnant la possibilité de la preuve contraire, sauf dans certains cas sans intérêt dans l'affaire actuelle;

Que le rapport, présenté à la Conférence à l'appui des dispositions devenues notamment l'article 56 de la Déclaration, explique clairement que le transfert opposable aux belligérants est celui qui n'a pas été motivé par le fait même de la guerre (Bl. Book. p. 326 et p. 212), mais, par exemple, par héritage;

German prize regulations.

Que cette manière de voir a été adoptée par la législation allemande (Prisenordnung du 30 septembre 1909.

Chap. II, art. 12° Reichsgesetzblatt du 3, VIII, 14), d'après laquelle le transfert n'est opposable que si le capteur a acquis la conviction "que le transfert aurait eu également lieu si la guerre n'avait pas éclaté, par exemple par suite d'héritage ou de contrat de construction";—par la législation autrichienne (Dienst-Reglement für die K. u. K. Kriegs-Marine du 2. V. 13; 3 art. III), laquelle reproduit purement et simplement le texte de l'article 56 de la Déclaration de Londres;—par la législation russe (Règlement sur les prises du 27 mars 1895, art. 7), d'après laquelle la preuve doit être faite que le transfert n'a pas eu pour objet de protéger la propriété ennemie; — par la législation britannique, qui a rendu applicable au cours de la guerre la Déclaration de Londres dans les mêmes termes que le décret français du 6 novembre 1914 précité (Order in Council du 29 octobre 1914); — par la jurisprudence et par la législation italiennes (décret du 3 juin 1911, Gaz. Uff. n° 150, du 15 juin 1915);

Que, aussi bien, comme l'a fait remarquer, en 1912, la Commission italienne des Prises (Atti della R^e^ commissione d. Prede; Guerra italo-turca, col. I, p. 197; aff. du Aghios Georghios 12 mai 1912), "si la capture est la sanction par laquelle le belligérant interdit aux navires marchands ennemis l'usage de la mer, il s'ensuit que l'acte quel qu'il soit, même motivé par un intérêt légitime, tendant immédiatement à soustraire le navire ennemi à cette sanction, ne peut être considéré par le belligérant que comme fait en fraude de son droit et par conséquent nul";

Considérant qu'en adoptant l'article 56 de la Déclaration de Londres, tel que, dans l'opinion de ce Conseil, il doit être entendu et, en consentant momentanément à ne pas appliquer les prescriptions séculaires de l'ordonnance du 26 juillet 1778, édictées en vue de l'assistance à prêter aux États-Unis dans l'intérêt de la liberté et expressément maintenues en vigueur par l'arrêté du 29 frimaire an VIII, le Gouvernement de la République n'a donc fait que suivre les vues et les pratiques les plus généralement admises;

Que l'opinion exprimée par l'honorable Cone Johnson (que lui-même a reconnu avoir été rédigée en hâte sans qu'il ait eu le temps ou la possibilité de la corriger et qui a fait l'objet des plus vives contestations au Sénat des États-Unis, notamment à la séance du 25 janvier 1915)

doit être regardée comme un plaidoyer en faveur de certains intérêts, mais non, ainsi que le soutient Edward N. Breitung, comme le commentaire officiel de la Déclaration de Londres;

Que, dans l'espèce, outre le singulier caractère de l'acte de vente, trouvé à bord et prétendu passé le 17 ou 19 décembre 1914 par la Compagnie H. A. L. et Breitung, qui ne l'a pas signé, ni personne pour lui, avec qui le directeur de ladite compagnie reconnaît n'avoir pas traité et qu'il déclare n'avoir jamais rencontré—même en admettant la régularité de l'acquisition du *Dacia* par Breitung—même en supposant la réalité de la cession du navire par la compagnie H. A. L. à Egon von Novelly, puis par celui-ci à Breitung—il est établi que, non seulement, comme il a été relevé dans d'autres affaires analogues (affaire du *Jemmy* en Angleterre, 17 juillet 1801, VI Rob. 31; I English Prize Cases, 331; affaire du *Benito Estanger*, aux États-Unis, 5 mars 1900, U. S. Rep. 176, p. 568; Story, Notes on the principles and practice of Prize Courts, publié par Pratt 1854, p. 63), le navire avait, après son transfert, "continué comme par le passé son commerce avec l'ennemi", mais encore qu'il effectuait, au moment de la capture, le voyage même pour lequel il avait été affrété alors qu'il était sous pavillon allemand et en vue du quel il avait été transféré sous pavillon neutre;

Qu'un semblable transfert sous pavillon neutre, ayant eu pour objet de permettre un trafic ennemi et de soustraire le navire à la capture, ne saurait être opposable aux belligérants;

Considérant que le Conseil est uniquement saisi de la validité de la capture du navire et, par conséquent, n'a pas à se prononcer en ce qui concerne la cargaison,

DÉCIDE:

Est déclarée bonne et valable la capture du vapeur *Dacia*, ensemble ses agrès, apparaux, armement et approvisionnements de toute nature, effectuée le 27 février 1915 par le croiseur auxiliaire de la République *Europe*, pour le prix en être attribué aux ayants droit conformément aux lois et règlements en vigueur; Decision.

Seront restitués aux ayants droits les objets et effets, propriété personnelle du capitaine et de l'équipage, et ne constituant pas des articles de contrebande.

Délibéré à Paris, dans les séances des 3 et 5 août 1915, où siégeaient: MM. Mayniel, président; René Worms, Rouchon-Mazerat, Gauthier, Lefèvre et Fromageot, membres du Conseil, en présence de M. Chardenet, commaissaire du Gouvernement.

En foi de quoi, la présente décision a été signée par le Président, le Rapporteur et le Secrétaire-greffier.

Signé à la minute:

E. Mayniel, *président.*
Henri Fromageot, *rapporteur;*
G. Raab d'Oërry, *secrétaire-greffier.*

Pour expédition conforme:

Le Secrétaire-greffier,
G. Raab d'Oërry.

Vu par nous, Commissaire du Gouvernement,
P. Chardenet.

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## THE "KIM," THE "ALFRED NOBEL," THE "BJORNSTERJNE BJORNSON," THE "FRIDLAND."

IN THE HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

[In Prize.]

July 12–Sept. 16, 1915.

[1915] P. 215.

Statement of case.

September 16. The President (Sir Samuel Evans). The cargoes which have been seized, and which are claimed in these proceedings, were laden on four steamships belonging to neutral owners, and were under time charters to an American corporation, the Gans Steamship Line. John H. Gans, the president of the company, is a German. He has resided in America for some years; but he has not been naturalized. The general agent of the company in Europe was one Wolenburg, of Hamburg.

The four ships were the *Alfred Nobel* (Norwegian), the *Bjornsterjne Bjornson* (Norwegian), the *Fridland* (Swedish), and the *Kim* (Norwegian). They all started within a period of three weeks in October and November, 1914, on voyages from New York to Copenhagen with very large cargoes of lard, hog and meat products, oil stocks, wheat and other foodstuffs; two of them had cargoes of rubber, and one of hides. They were captured

on the high seas, and their cargoes were seized on the ground that they were conditional contraband, alleged to be confiscable in the circumstances, with the exception of one cargo of rubber which was seized as absolute contraband.

The court is now asked to deal only with the cargoes. All questions relating to the capture and confiscability of the ships are left over to be argued and dealt with hereafter.

It is necessary to note the various dates of sailing and capture.

They are as follows:

| | Date of sailing. | Date of capture. |
|---|---|---|
| *Alfred Nobel*, | October 20, 1914 | November 5, 1914. |
| *B. Bjornson*, | October 27, 1914 | November 11, 1914. |
| *Fridland*, | October 28, 1914 | November 10, 1914. |
| *Kim*, | November 11, 1914 | November 28, 1914. |

Upon some of these dates may depend questions touching what orders in council are applicable. One order in council adopting with modifications the provisions of the convention known as the "Declaration of London" was promulgated on August 20, 1914, and another on October 29, 1914. Proclamations as to contraband, absolute and conditional, were issued on August 4, September 21, and October 29, 1914.

It is useful to note here, in order to avoid any possible misconception or confusion, that the later order in council of March 11, 1915 (sometimes called the reprisals order), does not affect the present cases in any way.

Before proceeding to state the result of the examination of the facts relative to the respective cargoes and claims, a general review may be made of the situation which led up to the dispatch of the four ships with their cargoes to a Danish port.

Trade with northern ports.

Notwithstanding the state of war, there was no difficulty in the way of neutral ships trading to German ports in the North Sea, other than the perils which Germany herself had created by the indiscriminate laying and scattering of mines of all description, unanchored and floating outside territorial waters in the open sea in the way of the routes of maritime trade, in defiance of international law and the rules of conduct of naval warfare, and in flagrant violation of The Hague convention to which Germany was a party. Apart from these dangers, neutral vessels could have, in the exercise of their international right, voyaged with their goods to and from

Hamburg, Bremen, Emden, and any other ports of the German Empire. There was no blockade involving risk of confiscation of vessels running or attempting to run it. Neutral vessels might have carried conditional and absolute contraband into those ports, acting again within their rights under international law, subject only to the risk of capture by vigilant warships of this country and its allies. But the trade of neutrals—other than the Scandinavian countries and Holland—with German ports in the North Sea having been rendered so difficult as to become to all intents impossible, it is not surprising that a great part of it should be deflected to Scandinavian ports, from which access to the German ports in the Baltic and to inland Germany by overland routes was available, and that this deflection resulted, the facts universally known strongly testify. The neutral trade concerned in the present cases is that of the United States of America; and the transactions which have to be scrutinized arose from a trading, either real and bona fide, or pretended and ostensible only, with Denmark, in the course of which these vessels' sea voyages were made between New York and Copenhagen.

Denmark is a country with a small population of less than three millions; and is of course, as regards food stuffs, an exporting, and not an importing, country. Its situation, however, renders it convenient to transport goods from its territory to German ports and places like Hamburg, Altona, Lubeck, Stettin, and Berlin.

Cargoes.

The total cargoes in the four captured ships bound for Copenhagen within about three weeks amounted to 73,237,796 pounds in weight. (These weights and other weights which will be given are gross weights according to the ships' manifests.) Portions of these cargoes have been released, and other portions remain unclaimed. The quantity of goods claimed in these proceedings is very large. Altogether, the claims cover 32,312,479 pounds (exclusive of the rubber and hides). The claimants did not supply any information as to the quantities of similar products which they had supplied or consigned to Denmark previous to the war. Some illustrative statistics were given by the Crown, with regard to lard of various qualities, which are not without significance, and which form a fair criterion of the imports of these and like substances into Denmark before the war; and they give a measure for comparison with the imports

of lard consigned to Copenhagen after the outbreak of war upon the four vessels now before the court.

The average annual quantity of lard imported into Denmark during the three years 1911–1913 from all sources was 1,459,000 pounds. The quantity of lard consigned to Copenhagen on these four ships alone was 19,252,000 pounds. Comparing these quantities, the result is that these vessels were carrying toward Copenhagen within less than a month more than thirteen times the quantity of lard which had been imported annually to Denmark for each of the three years before the war.

Effect of war on commerce.

To illustrate further the change effected by the war, it was given in evidence that the imports of lard from the United States of America to Scandinavia (or, more accurately, to parts of Europe other than the United Kingdom, France, Belgium, Germany, the Netherlands, and Italy) during the months of October and November, 1914, amounted to 50,647,849 pounds as compared with 854,856 pounds for the same months in 1913—showing an increase for the two months of 49,792,993 pounds; or in other words the imports during those two months in 1914 were nearly sixty times those for the corresponding months of 1913.

One more illustration may be given from statistics which were given in evidence for one of the claimants (Hammond & Co. and Swift & Co.): In the five months August–December, 1913, the exports of lard from the United States of America to Germany were 68,664,975 pounds. During the same five months in 1914 they had fallen to a mere nominal quantity, 23,800 pounds. On the other hand, during those periods, similar exports from the United States of America to Scandinavian countries (including Malta and Gibraltar, which would not materially affect the comparison) rose from 2,125,579 pounds to 59,694,447 pounds. These facts give practical certainty to the inference that an overwhelming proportion (so overwhelming as to amount to almost the whole) of the consignments of lard in the four vessels we are dealing with was intended for, or would find its way into, Germany. These, however, are general considerations, important to bear in mind in their appropriate place; but not in any sense conclusive upon the serious questions of consecutive voyages of hostile quality, and of hostile destination, which are involved before it can be determined whether the goods seized are confiscable as prize.

Inference as to destination.

The dates of sailing and capture have been given with an intimation that they may have a bearing upon the law applicable to the cases.

The *Alfred Nobel*, the *Bjornsterjne Bjornson*, and the *Fridland* started on their voyages in the interval between the making of the two orders in council of August 20 and October 29. The *Kim* commenced her voyage after the latter order came into force.

By the proclamation of August 4 all the goods now claimed (other than the rubber and the hides) were declared to be conditional contraband. The cargoes of rubber seized were laden on the *Fridland* and the *Kim*. Rubber was declared conditional contraband on September 21, 1914, and absolute contraband on October 29. Accordingly the rubber on the *Fridland* was conditional contraband; and that on the *Kim* was absolute contraband.

The hides were laden on the *Kim*. Hides were declared conditional contraband on September 21, 1914. No contention was made on behalf of the claimants that the goods were not to be regarded as conditional or absolute contraband, in accordance with the respective proclamations affecting them; that is to say, it was admitted that the goods partook of the character of conditional or absolute contraband under the said proclamations, and were to be dealt with accordingly.

Details as to ships and cargoes.

The law can best be discussed and can only be applied after ascertaining the facts. The details relating to the ships and their cargoes which it has been necessary to examine are very voluminous. I must try to summarize them for the purposes of this judgment, in order to make it intelligible in principle, and in the results. To attempt to give even a moderate proportion of the details would tend to bewildering confusion.

The number of separate bills of lading covering the cargoes on the four vessels is about 625.

Four large American firms were consignors of goods on each of the four vessels; and a fifth on two of them.

According to the figures given to the court, those five American firms were consignors of lard and meat products to the following extent:

| | Pounds. |
|---|---|
| Armour & Co. | 9,677,978 |
| Morris & Co. (with Stern & Co.) | 6,868,213 |
| Hammond & Co. (with Swift & Co.) | 3,397,005 |
| Sulzberger and Sons Co. | 2,602,009 |
| Cudahy & Co. | 729,379 |
| This makes up a total of | 23,274,584 |

These figures I accept as substantially correct. They were given by the law officers of the Crown. The other figures in my judgment I am responsible for.

Those portions of the cargoes which have been released, and those which have not been claimed, will be dealt with in a separate judgment. There is some overlapping, as some parts of the cargoes have been claimed by the consignors, and also by some alleged vendees. For these and other reasons some corrections in the figures which follow may become necessary; but they are substantially correct as they stand in the various documents, and as they were dealt with at the hearing; and certainly sufficiently accurate for the purpose of determining all questions relating to the rights of the Crown to condemnation, or of the various claimants to release.

An analysis of the claims shows the following results:

I. Morris & Co. (with Stern & Co.).

| | Pounds. | Pounds. |
|---|---|---|
| Direct claims by these companies to goods laden on the four ships amounting to | | 5,176,327 |
| Other subclaims by claimants who allege that they had bought and had become owners of goods consigned by the above companies: | | |
| (1) Pay & Co.—Goods on the *A. Nobel* and the *B. Bjornson* | 411,660 | |
| (2) Christensen and Thoegersen—Goods on the *A. Nobel* and the *B. Bjornson* | 110,428 | |
| (3) Brödr Levy—Goods on the *A. Nobel*, the *B. Bjornson*, and the *Kim* | 132,036 | |
| (4) J. O. Hansen—Goods on the *B. Bjornson*, *Fridland*, and *Kim* | 196,873 | |
| (5) Segelcke—Goods on the *B. Bjornson* and the *Kim* | 275,297 | |
| (6) Pedersen—Goods on the *B. Bjornson* | 45,219 | |
| (7) Henriques and Zoydner—Goods on the *B. Bjornson* | 81,096 | |
| (8) Korsor Margarin Fabrik—Goods on the *Fridland* and the *Kim* | 26,639 | |
| (9) Margarin Fabrik Dania—Goods on the *Fridland*. | 9,004 | |
| (10) Erik Valeur—Goods on the *Kim* | 106,155 | |
| | | 1,394,407 |
| Total | | 6,570,734 |

[The detailed statement of other claims is omitted.]

It will be convenient to investigate the cases of these shippers first in this order, both as regards the *Alfred Nobel* and the other three steamers, upon all of which these two companies were heavy consignors.

AS TO MORRIS & CO.'S CLAIM.

This meat-packing company of Chicago and New York at the beginning of the war had a large business with Germany, which they carried on, at the Europe end, at Hamburg. They had in their employ at Hamburg two persons named McCann and Fry. Fry was their manager.

European agents.

They appear to have had an agent also at Copenhagen of the name of Conrad Bang. The transactions relating to their shipments of between six-and-a-half and seven million pounds of products on the four vessels were carried through by McCann and Fry, and not by Bang. Not long after the war began McCann and Fry left Hamburg and took up their quarters at Copenhagen. McCann was named in hundreds of the bills of lading in which Morris & Co. were the shippers as the "party to be notified." He was so named in all, with a few exceptions which are insignificant.

He had no business at Copenhagen or in Denmark before the war. He had apparently no office in Copenhagen. His address was "the Bristol Hotel."

The instructions to him from Morris & Co. as to the change from Hamburg to Copenhagen, and as to the initiation and progress of the business transactions carried on either at or through Copenhagen, must have been in writing unless he visited America, or some one from America visited him. No such instructions were produced in evidence and no explanation was given of them. Not a single letter passing between Morris & Co. and McCann or Fry was produced. A few telegrams were in evidence, but that was due to their having been intercepted by the British censor and they were put before the court by the procurator general. McCann did not even make an affidavit in explanation of his own part of the transactions. Nor did Fry. Affidavits from them, if they comprised a complete and truthful statement of the facts within their knowledge, would have been of value and assistance to the court.

Intercepted telegrams.

On November 28 McCann and Fry together formed a company in Copenhagen under the name of the "Dansk Fed. Import Kompagnie." Its capital was only about 120l. (2,000 kronen); but it imported lard and meat by the end of the year (i.e., in about five weeks) to the value of about 280,000l. (5,000,000 kronen). Later on, McCann is cabling from Copenhagen to Morris & Co. in New York, "Don't ship any lard Copenhagen, export prohibited."

Afterwards, goods like lard and fat backs were consigned by Morris & Co. to Genoa—Italy had not then joined in the war.

The evidence put forward in support of the direct claim of Morris & Co. was an affidavit of Mr. Harry A. Timmins, which was sworn in Chicago on May 27, 1915. Mr. Timmins is the assistant secretary and treasurer of the company. The case which he there makes is that the goods had been sent to Copenhagen in the ordinary course of the business of the company in Denmark itself.

It is advisable to set out the main paragraphs verbatim:

"2. The claimant (Morris & Co.) has for many years shipped considerable quantities of its products to Denmark, both directly to Copenhagen and through adjacent branch houses. The sale of such products for several years was made either through the Morris Packing Company, a corporation of Norway, or an individual salaried employee of the claimant. Said Morris Packing Company or said salaried individual employee of claimant always had strict instructions from the claimant to confine sales to Denmark, Scandinavian countries, and Russia, and not to sell to any other countries owing to the fact that the claimant has agents in other countries, and it is essential that said agent's operations be strictly confined to his own district.

Morris & Co.'s evidence.

"4. In the month of October, 1914, the claimant shipped on board the Norwegian steamship *Alfred Nobel* [the paragraphs in the affidavits relating to the other three steamships are identical] the goods particulars of which are set out in the schedule to this affidavit. The whole of said goods was shipped 'to order' Morris & Company, notify claimant's agent in Copenhagen (said agent being a native-born citizen of the United States of America) for sale on consignment in the agent's own district in the ordinary course of business. The standing instructions to the agent that no sales were to be made outside the agent's district were never withdrawn by the claimant."

The deponent refrains from giving any particulars or even summaries of the "considerable" quantities of the company's products shipped to Copenhagen or Denmark for the years before the war; he does not even say what the "products" shipped were; but the impression clearly intended to be produced was that the goods on the four ships in question were sent in the Denmark business, and

were not to be sold by the "salaried employee" or "agent" in other countries "outside the agent's district."

There is no reference to any German market to be supplied from Denmark. Germany is not even mentioned.

The "agent" in Copenhagen is carefully described as "a native-born citizen of the United States of America," but otherwise he is left shrouded in anonymity. Mr. McCann was his name. His collaborator, Fry, is not mentioned. Nor is the company (the Dansk Fed. Kompagnie) which they formed in November, 1914, disclosed. For aught the affidavit says or suggests, the business attentions of Mr. McCann might have been confined for many years before the war to the comparatively humble and quiet Danish or Scandinavian district of the claimant's business. His and Fry's real business activity up to October, 1914 (we now know), was in the great center of Hamburg.

The solicitors for the claimants had been instructed soon after the seizure to put forward the same kind of case, although more limited, because the authority was then said to be to sell only in Denmark to the exclusion of the rest of Scandinavia and Russia; for in a letter to the procurator general in December, 1914, they wrote: "The duty of the consignor's representative in Copenhagen was to sell only for delivery in Copenhagen against cash (except as to 800 tierces of lard shown in the table set out in our letter to you of the 11th inst. which were going to Christiania) and it was never the intention of the consignor's agent, nor had he any authority, to reship the goods from Copenhagen to another port." When Mr. Timmins swore his affidavit, that of the procurator general had not been filed, and Mr. Timmins had probably little or no idea of the information which had been gleaned for the Crown by the intercepted telegrams, letters, and otherwise. No further affidavit has been made by Mr. Timmins or any one else on behalf of these claimants, and no attempt has been made to deal with the materials which raise suspicion, or to elucidate circumstances involving doubt, in relation to the bona fides of the transactions and claim. Not a single original book of account, letter book, or any other of the usual commercial documents which must have been kept by or for Mr. McCann in Copenhagen has been produced.

Intercepted letters, etc.

This court has on various occasions during the present war pointed out the importance of producing original documents fully and promptly when a claim is made, and particularly where the bona fides of the claim is put in question. In the circumstances I say without hesitation that the bare account given of the transactions in Mr. Timmins's affidavit is not only wholly insufficient, but is also disingenuous and misleading. The picture exhibited of the ordinary regular Danish trade carried on by Morris & Co., through Mr. McCann, is marred when alongside of it is seen the shipment and transport toward Copenhagen by this company of lard and meat products in less than a month more than quadrupling the annual quantity imported into Denmark from all sources for a year on the average of three years before the war.

Inference from amount of cargo.

In a letter dated November 25 in the "Ascher" correspondence (hereinafter referred to in connection with the claim of Cudahy & Co.), a firm of dealers in Hamburg well acquainted with the trade wrote from Hamburg: "We met Mr. McCann of the Morris Provision Company on 'change to-day [that was at Hamburg] back from Copenhagen. He was very sceptical with regard to the *Alfred Nobel* affair, and rather inclined to the opinion that the provisions on board of that steamer would never be allowed to reach Copenhagen, because it was too open-faced a case of the lard being intended for Germany to expect any other result." This was disclosed to the claimants a couple of months before the conclusion of the trial, but they did not deem it necessary, or perhaps expedient, to trouble themselves to contradict or explain the statement. The only way it was dealt with at the trial was by their counsel submitting that the letter was not evidence. I will deal with this question later, when the correspondence will be more fully referred to.

From other parts of the case it is shown that one Erik Valeur also claimed to be an agent of Morris & Co. for Denmark, and to have acted as such in the sale of considerable quantities of the goods shipped on these vessels by Morris & Co. I will for convenience deal with this subject when I come to Valeur's claim. I note this because the facts which will be there referred to have a bearing also upon the claim of Morris & Co. and also on their statement that their sole agent in Denmark was Mr. McCann.

Prohibition of exports.

I have already referred to a cablegram dispatched by McCann from Copenhagen to Morris & Co., at New York, on January 24, 1915. "Don't ship any lard Copenhagen, export prohibited." The export had been prohibited by the Danish Government on January 11.

This cablegram was of course subsequent in date to the seizure of the cargoes in these cases. Nevertheless it is neither immaterial nor unimportant. It testifies clearly to two things: That lard was not required by or for Denmark, and that the previous importation into Copenhagen was in the main, at any rate, a mere stage in its passage into Germany.

In connection with the prohibition against exportation of foodstuffs it is well known, as a matter of public reputation, that in order to avoid international difficulties the Scandinavian countries as neutrals, from good political motives, issued orders from time to time, prohibiting the export from the respective countries of goods like lard, smoked meat, and other foodstuffs, oleo stock, hides, and rubber. For details of such prohibitions reference may be made to the affidavit of Mr. Henry Fountain, of the British Board of Trade, sworn on June 1, 1915.

These are matters also which tend to throw light upon the question of the real destination of the goods nominally consigned to Copenhagen; and the court is entitled to take them into consideration and to place them in the scales when weighing all the evidence.

In the course of the trial, upon the facts which had then been given in evidence, I addressed some questions to Mr. Leslie Scott, counsel for Morris & Co. I asked him whether in respect of the foodstuffs which Morris & Co. consigned to their own order, or to that of their agent at Copenhagen, and not to any independent consignee, he contended that they were "intended for a Danish market or for the German market."

His answer was: "My submission is that there is no evidence as to which they were intended for in regard to any specific consignment, but that it was expected that the great bulk would find its way to Germany ultimately is obvious." And that it was so expected by his clients, he said, was obvious.

Then I observed: "In other words, those goods would not have been sent to Denmark if the Germans were not close by?" and Mr. Scott answered, "That is obvious."

I then asked for information as to any merchant or person in Germany with whom Morris & Co. were in communication with reference to the shipments in question, which they expected would find their way into Germany.

The answer of their counsel was as follows. I will give the exact words, because there was some discussion as to what was said:

Destination.

"It must depend upon the facts, as to which I have no instructions or evidence. The position seems a fairly clear one—that before the war, Hamburg, of course, was the great center of importation, not only for Germany, but for Denmark, and also probably largely for Norway and Sweden. Hamburg is the great free port of northern Europe, and the bulk of the American foodstuffs went there, as your lordship sees from the figures which were given in consequence of your question. After the war, and importation with that port stopping, two results happened—one was that the German demand for the civil population as before the war has to be met, and the neutral country, the United States, in the ordinary course of business, sets out to supply that demand. The second point is that the supply of Denmark and the other Scandinavian countries has to be met; but the particular importing ports of Germany being closed, the difference is that the great stream of produce going to Germany and the three Scandinavian countries goes to Scandinavian ports. Before the war, in the case of Morris & Co., they had agents in Germany. On the war breaking out, it is no use the agents remaining in Germany, but they go to Denmark. Mr. McCann goes to Denmark, and there is no question about that. They receive the consignments. That they should not be in communication at all with Germany and German buyers under those circumstances is obviously a ridiculous idea. No one would imagine it, and I do not suppose, apart altogether from any evidence in the case, that your lordship, dealing with inferences of fact, would come to the conclusion that the representatives of Morris in Denmark were not in communication with anyone in Germany. I am not here to put forward that suggestion."

At a later stage the learned counsel said: "It may be perfectly true that [the shippers] may have thought that the whole was intended—we know that the whole was not

intended—for German consumption. I have never disputed it. I have always said the market through Copenhagen was Germany."

In connection with these statements, it is important to emphasize the point, which has already been adverted to, that the claimants, and McCann their representative, did not give the court any information—all of which was within their power to give—as to the arrangements made for sending the "great bulk," or the "greater part," of the cargoes to Germany; as to who were the consignees, or the intended consignees; or as to what ports or places in Germany the cargoes were intended or expected to be sent.

In the course of a discussion at the trial (more particularly to be referred to in Armour's case) counsel for Morris & Co. expressed his readiness to produce evidence as to the amount of lard, bacon, and other products of the kind in question which Morris & Co. had supplied to Germany during the two or three years before the war.

No such evidence has since been produced, although any necessary adjournment for the purpose was offered.

Before concluding the statement of facts as to Morris & Co., two other matters have to be mentioned.

The first is that Stern & Co., in whose name certain goods were shipped, is a subsidiary company of Morris & Co., and the case of Stern & Co., by the request of counsel, was taken with Morris's claim, and treated as identical with it. The second is that the claims of ten claimants to certain parcels of goods shipped by Morris & Co. who allege they were owners of such goods as purchasers from the shippers will have to be dealt with; and that facts affecting Morris & Co.'s position relating to those subclaims must be taken as supplemental to those already adverted to in dealing with their direct claim.

The legal questions which arise with regard to the real destination of the goods claimed by Morris & Co. are identical with those arising in other claims.

I will deal with these legal questions after the examination of the facts in all the cases.

### AS TO ARMOUR & CO.'S CLAIM.

European agents.

This American company had before the war a subsidiary company—Armour & Co., Aktieselskab—at Copenhagen acting as agents. These agents (it is said) had always had strict instructions from the claimants to con-

fine their sales to Denmark, other Scandinavian countries, Finland, and Russia, and not to sell to any other countries, as the claimants had agents in other countries and the operations of each agent were to be strictly confined to his particular district.

The Copenhagen office was a small one; the staff consisted of a manager, clerk, office boy, and typist, according to the evidence of the procurator general; or of a manager, assistant salesman, chief accountant, assistant accountant, and office boy, according to the affidavit of Mr. Urion.

Before the war, the claimants' principal branch was at Frankfort, where their German business was carried on.

No information was given by the claimants as to what became of, or as to what was done at, this branch after the war.

As to the Copenhagen office, not even the name of the manager was given to the court. No one from Copenhagen favored the court with any evidence as to the extensive transactions involved in the shipments by these claimants.

Armour & Co.'s direct claim is to nearly eight million pounds of foodstuffs. When the amounts of their alleged vendees' claims are added, the total is over nine and a half million pounds. This enormous quantity was consigned to their agents at Copenhagen within one month. How came it to be sent? What were the instructions of the anonymous manager at the Copenhagen office with regard to its disposal? With the exception of comparatively small quantities of casings, canned beef, and fatbacks, it was all lard of various qualities. The average monthly quantity of lard exported from the United States to all Scandinavia in October and November, 1913, was 427,428 pounds; a year later, in about three weeks (from October 20 to November 11, 1914), it is shown that this one company was shipping to Copenhagen alone considerably over twenty times that quantity.

Increased shipments.

It was deposed by the procurator general that Armour & Co.'s shipments to Copenhagen of hog products from October to December, 1914, were approximately equivalent to their total shipments to Copenhagen during the whole preceding eight years. These figures were not contradicted or contested. In the course of the hearing an opportunity was given to the claimants to deal with these facts, and to produce evidence of what the imports into

Germany by or through Armour & Co. of similar products were during the two or three years before the war. The Crown did not oppose any adjournment which might be necessary for this purpose. Sir Robert Finlay, as counsel for Armour & Co., said: "We will get that statement without delay as to the amount of those articles (namely, lard, bacon, and other foodstuffs) exported in three years before the war into Germany by Messrs. Armour & Co." No such statement was produced; and therefore (as I intimated during the discussion) I have to decide upon the materials which had been placed before me at the conclusion of the hearing. The claim of Messrs. Armour & Co. (dated April 21, 1915) was made on the ground that the goods were their property as neutrals shipped on neutral vessels, and consigned to neutrals at a neutral port; and that the goods were not intended for sale to or use by or on behalf of an enemy Government, or the armed forces of an enemy. The main evidence in support of the claim was an affidavit sworn May 27, 1915, by Mr. Meeker, one of the vice presidents and managers of Armour & Co. It is practically in the same terms as the affidavit sworn in support of the claim of Morris & Co. It is indeed a "common form" affidavit. The pith of it is that "the whole of the said goods were shipped to the order of the agent in Copenhagen for sale in the agent's own district in the ordinary course of business. The standing instructions to the agent that no sales were to be made outside the agent's district were never withdrawn by the claimants, and the agent had no authority to sell the goods except to firms established in Denmark, other Scandinavian countries, Finland, or Russia."

Armour & Co.'s evidence.

Germany is not named; and the impression conveyed, and clearly intended to be conveyed, was that the goods were shipped and consigned for purely Scandinavian business, as if the war had not intervened.

As to the shipment on the *Kim*, however, there was this additional paragraph:

"The S. S. *Kim* sailed from the port of New York on November 10, and up to that time the claimants had no knowledge whatever of the order in council of the British Government of October 29, 1914, which was not received by the State Department at Washington until after the said vessel had sailed."

That is not in accordance with the facts; for the order in council had been notified to the American ambassador

on October 30, and was published in New York on November 2.

Further affidavits were filed.

One was by Mr. Finney, which is wholly immaterial. Another was by Mr. Garside, dealing only with that part of the shipment which consisted of canned beef; to which reference will be made hereafter.

The last was by Mr. A. R. Urion, and was sworn about a week after the hearing in court had commenced.

Mr. Urion deals with various matters before the war, but as to transactions after the outbreak of war he deposes as follows:

"PAR. 6. None of the goods shipped by Armour & Co. to the Copenhagen company subsequent to the outbreak of war were sold to the armed forces or to any Government department of Germany or to any contractor for such armed forces or Government department. About 90 per cent of the goods were sold to firms who had been customers of the company and established in Denmark and Scandinavia for many years. These sales were all genuine sales, and payment was made against documents in the ordinary way, and on delivery Armour & Co.'s interest in the goods absolutely ceased."

It is to be observed that he does not specify what the goods were, or to whom or when they were sold. The statement about the genuine sales of 90 per cent can not refer to the goods in the four ships in question. Such a statement as to those goods would be wholly untrue; and when he talks about payment and delivery of the goods, that must refer to some other goods, because those now in question never were delivered. It is significant that in this last affidavit filed for the claimants, Mr. Urion avoids altogether any explanation of the shipment, or sale, of the goods which his company now claim.

Tinned beef.

Part of the shipments consisted of canned beef in tins. The quantity was 5,600 dozen tins of 24 ounces each net, equal to 100,800 pounds. There was evidence before me, on behalf of the Crown, that cases of this size were not usual for civilian markets; that large quantities of this particular brand of tinned meat in tins of that size had been offered for use in the British Army; and that these packages could only have been intended for the use of troops in the field.

Evidence was given for the claimants to the contrary. But it is important to observe that no evidence was

given that a single tin of that kind had ever been sent by Armour & Co. into Denmark before the war; nor, indeed, that any had been sent theretofore to Germany for the civilian population.

I do not say that it was proved that none were so sent. But it was not proved that any had been sent. Mr. Garside's affidavit, dealing with this matter, is vague, and supplies no evidence that a single pound of canned meat in these tins had ever been sent before the war to Denmark or to Germany. This was pointed out to Sir Robert Finlay during the argument, and, in consequence, the promise (already mentioned) to supply a statement as to this was made.

Although the claim, which had formally been put forward upon the affidavits, was that the goods shipped by Armour & Co. were sent in the ordinary course of the Danish or Scandinavian business, it is significant that at the hearing the ground adopted by Sir Robert Finlay was not the same. I will not paraphrase his statement of this ground, but will give his exact words:

"My case is not that they were all to be consumed in Denmark or Norway; my case is that they were not consigned to the German forces, and it was almost certain there was no continuous voyage."

Upon this the solicitor general intervened and said:

"I think I heard my learned friend say a moment ago that his case was not that these goods were destined for Danish consumption but for German civilian consumption."

Then Sir Robert Finlay answered:

"No; I said that our case was not that the goods were intended for consumption in Denmark, but that the persons to whom they were consigned sold them to Germany."

Consignees.

But as will be seen from the figures already given of the goods shipped by Armour & Co., less than one-fifth were said to have been sold to consignees; and the undisputed fact is that more than four-fifths had not been sold; and these are in fact claimed by Armour & Co. as having remained their property.

There are several references to Armour & Co. in the Ascher correspondence, but one passage refers to them alone and specially, and some explanation of it might have been expected. It relates to another vessel; but

it illustrates the nature of Armour's business with countries contiguous to Germany in November, 1914.

On November 11 E. Ascher writes to Cudahy & Co.:

"Mr. Boernbrink had a conversation with the representative of Armour & Co., in Rotterdam, who assured him that his principals had booked several parcels of stuff intended for German buyers on the steamship *Maartensdyk* without being compelled to sign a declaration; and if this is according to fact, we can not explain why Messrs. Armour & Co. should be in a position to accomplish what you can not."

More facts relating to the shipments of Armour & Co. will be stated when I deal with the claims of their alleged vendees, namely, the Provision Import Co., Christensen and Thoegersen, Brödr Levy, Hansen, and Frigast; and the present statements as to their direct claim must be supplemented by any material facts emerging from the consideration of the subclaims.

Finally, I note that the claimants did not produce any letter, telegram, contract, or any other document passing between them and their agents in Copenhagen touching any part of the enormous quantities of goods shipped; and not one single book of account, or commercial document of any kind kept by their agents in Copenhagen, dealing with the goods claimed, was disclosed.

AS TO THE CLAIM OF SWIFT & CO. AND HAMMOND & CO.

These two firms are connected, and their claims were taken as one. Together, the goods they shipped amounted to over three and one-fourth million pounds; Swift & Co. consigning over two million, and Hammond & Co. over one million pounds. In all cases the consignments were to their own order. No part of Swift's two million pounds had been sold, or contracted to be sold, to any one at the time of seizure. (It had been alleged and sworn by Mr. Edward Swift that a portion had been sold to one Dreyer of Aarhuus; but at the hearing this was not relied on.) But it was alleged that a considerable part of Hammond's goods had been sold to two firms, Buch & Co. and Bunchs Fed., whose subclaims will be dealt with hereafter. European agents.

The affidavit in support of the claim was in the same common and perfunctory form as those in the last two cases.

The unnamed "salaried employee" and "agent," and the standing "instructions" to the agent to confine his sales to his district (in this case "Denmark"); the consignment "for sale in Denmark," and "only to firms established in Denmark," have become stereotyped. At the hearing it transpired that the person to whom the two companies intrusted the transaction of the business was one Peterman, their manager at Hamburg. After the war began an intercepted cablegram showed that on September 1, 1914, Swift instructed their agents at Rotterdam to ask their Hamburg office if it recommended consignments of meats and lards to a bank at Copenhagen, and if so what quantities, and who would sell, and what percentage of invoice value they could draw. The court was not informed what answer was given by Peterman. At an early date, September 16, 1914, Peterman advised the companies to discontinue consigning their products, nevertheless later it is found that they cabled to Peterman to make sure to arrange proper storage at Copenhagen for their consignments, in view of the possible large number of consignments by other parties.

Again Peterman is asked if he can insure against war risk by other than German companies; and if not, to give name and financial standing of German companies, and to get assurance that losses would be promptly paid without complications. Before the war, a person of the name of Stilling Andersen of Copenhagen seems to have been intrusted with whatever business the claimants had in Denmark. After the seizure of the first three vessels, and after the sailing of the fourth, Swift & Co. write to Lane & Co. (who represented them in London) a letter (November 17) in which they say: "If it is necessary for you to obtain proofs of our ownership, will you kindly apply to Mr. H. Peterman, Copenhagen, at which point we have opened an office, in order to facilitate the handling of our business in Denmark, under the existing disadvantageous conditions. For your guidance, it might be well for us to mention that our business in Denmark for many years past has been carried on under the jurisdiction of our Hamburg office, Mr. Peterman there having charge of same."

Neither Mr. Peterman, nor any one acting for Swift & Co. or Hammond & Co., in Copenhagen, nor any one from their Copenhagen bankers made any affidavit, or

gave any evidence relating to the business in which the large shipments in question were made.

The situation was described by counsel for Swift & Co. as follows:

"It comes to this, Stilling Andersen was the agent in Copenhagen. He was under the control of Peterman in Hamburg. The business that was done in Denmark was handled from Hamburg, Stilling Andersen being the local agent. Then when Peterman came across to Copenhagen Peterman would be the person still in control, although I dare say Stilling Andersen would still be the agent, though probably under the control of Peterman."

Later on (but before December 10) Peterman's name was entirely dropped out; and in the cablegrams relating to the business the name of "Davis" was used for Peterman. No evidence was given to explain why this "alias" of Peterman was adopted and used; nor was any evidence produced to show how the "alias" had been communicated to the Copenhagen or Hamburg offices.

No book of account, or correspondence or document of any kind kept by Peterman or any other agent of the claimants at Copenhagen relating to the business, was disclosed.

Thus was the case of Swift & Co. and Hammond & Co. left.

AS TO THE CLAIM OF SULZBERGER & SONS CO.

This company's direct claim related to close on $1\frac{3}{4}$ million of pounds. Their goods were shipped on all the vessels. There is a subclaim by Pay & Co. for over 800,000 pounds. The consignments, Sulzbergers' claim, were all to their own order—Leopold Gyth, of Copenhagen, being the party to be notified. It was said that Gyth was since August 1, 1914, the agent of the company for the sale of its products in Denmark. For some years before that Pay & Co. were the agents; and there was a controversy as to whether their agency had really ceased at the time of the seizure.

European agents.

In a letter written by Pay & Co. to Sulzbergers on July 20, 1914 (about a fortnight before the war), they explain that the sales for the company had been retrograding owing to the manufacture of vegetable margarine having become predominant in Denmark, 80 per cent of the produce being vegetable. In these circumstances

it is strange that no evidence was forthcoming from Gyth, or any one else, to explain these large shipments.

It was put forward in the affidavit that the bills of lading had been dispatched through a bank to Copenhagen—I assume to a bank there—and that they had been returned. No correspondence was produced as to this; nor was there any evidence from any Copenhagen bank.

There is very little trace of anything which Gyth, the alleged agent, really did. I think there is only one cablegram to him at Copenhagen in 1914 amongst those intercepted. That was sent on October 16.

Sulzbergers' methods.

Other people connected formerly, and probably at the time, with Sulzbergers' Hamburg office were much more active. The earliest record of the Sulzberger transactions after the war began which was produced to the court was a letter of September 21, written by Sulzbergers from Hamburg to Pay & Co. It is an important letter, showing what Sulzbergers' business projects at the time were, and to what devices they were willing to descend in order to get goods into Germany. It is best to set it out verbatim:

HAMBURG, *September 21, 1914.*

Messrs. PAY & CO., *Copenhagen.*

DEAR SIRS: We acknowledge receipt of your esteemed favor of 17th instant, contents of which duly noted.

It is possible for us to buy great quantities of oleo and lard, etc., from America c. i. f. Stettin.

We beg to ask you whether it is possible to send the goods from America, via Copenhagen to Stettin, if the bill of lading bears the following inscription, "Party to be notified, order Pay & Co.," so that you stand quasi as consignee. You had then to transmit the goods for us to Stettin, for which we are willing to pay you a small allowance. We await your kind news as to this point.

Concerning Mr. Leopold Gyth is at present nothing to be done with this gentleman, which is not astonishing under the critical circumstances prevailing.

Very truly yours,

SULZBERGER & SONS CO.

Here are the claimants, through their Hamburg office, scheming to do what the Crown contend they intended to do in relation to the goods seized. Pay & Co. declined to comply. Whether Pay & Co., or Gyth, afterwards did what they were asked to do is another matter. But Gyth is afterwards named in all the bills of lading as the party to be notified. No explanation of this circumstance was vouchsafed.

Two German representatives of Sulzbergers, namely, Christiensen and Saemann, are afterwards at a Copenhagen hotel and are active over the cables. One of them shows that Christiensen, and not Gyth, was dealing with the war risk of the *Fridland*. Saemann in another (his twentieth) cable suggests the discontinuance of selling until cargoes seized should be released; and again he cables that he could ship to Sweden, "but that guarantee was required," which of course meant guarantee against exportation.

In connection with this it may be noted that Saemann cabled, again from Copenhagen, in January, that exportation of lard, casings, and fatbacks from Norway had been prohibited; and Pay & Co. also cabled to them "Don't ship any lard Copenhagen" (after exportation from Denmark had been prohibited); in what capacity, whether as agents or not, was not explained.

It is interesting to note that Sulzbergers of Liverpool, in reference to these prize proceedings, ask the claimants over the cable, "Will it be convenient call witnesses from port destination show goods not intended enemy use?"

Whether there was an answer to that question I do not know, but the practical answer at the hearing was that it could not have been deemed convenient, as no witness from Copenhagen gave evidence either verbally or by affidavit.

In November, a cablegram shows that Sulzbergers had also supplied, or offered to supply, their corned beef to the French Government.

This they had a perfect right to do, subject to any risk of capture by enemy ships. It would be strange if they had been unwilling to do the same for Germany. The risk of capture of goods sent to France was very small compared with the risk of goods consigned to Germany. Dealings with the French Government could accordingly be had direct with practical safety. If there were to be transactions with the German Government, a much more indirect and involved plan may well have been deemed expedient.

No particulars were given of any business carried on by the claimants at Copenhagen before the war. As in other cases, no books of account or any documents from the Europe end were disclosed; nor indeed any documents except the bills of lading and insurances.

No evidence was given at Sulzbergers touching the goods alleged to have been sold to Pay & Co.

Further facts relating to the claimants will be given in dealing with the claim of Pay & Co.

AS TO THE CLAIM OF CUDAHY & CO.

The direct claim of this company is in respect of 176,559 pounds of lard and beef casings shipped on the *Alfred Nobel* and the *Fridland*, to their own order—party to be notified Schaub & Co. The shipments were before the order in council of October 29.

The grounds of their claim are that they had sold the goods to Schaub & Co. for the Danish business of their firm at Esbjerg; that they had drawn upon them for the price, but that the drafts were not accepted by reason of the seizure; and that the goods remained the property of the claimants.

The claimants were dealing with the French Government (see Exhibit J. P. M. 2, pp. 1 and 8); and they were in close communication with E. Ascher & Co., of Hamburg, with reference to their trade with Germany, as the Ascher correspondence (J. P. M. 10) so clearly shows.

Contraband trade.

The claimants were quite open to carry on a trade in contraband with the enemy, as the facts clearly show; but the question as to the goods they now claim is whether they steered clear of dangers by a bona fide sale to Schaub & Co., of Copenhagen, for use in Denmark. It was said that as to the lard (which was the chief consignment) it was to go through a refining process at Esbjerg. Whether afterwards the refined lard would have been sent to Germany is immaterial upon the question now before the court, if it was at the time of seizure on its way to Denmark to a purchaser who intended to put it through a manufacturing process there.

The documents in this case were put fairly before the court; and—although there are circumstances of suspicion—the conclusion to which I have come is that there were bona fide contracts of sale of the particular goods claimed by Cudahy & Co. to Schaub & Co., of Copenhagen, and that these goods were on their way to

Real destination.

Denmark as their real and bona fide destination, and were intended to be imported on their arrival into the common stock of the country. The larger proportion of Cudahy's shipments is the subject of claims by Christen-

sen and Thoegersen, and Elwarth, which will be dealt with in their appropriate places.

I have now stated the separate facts affecting the cases of the American shippers, and before proceeding to the cases of the alleged Scandinavian purchasers I will refer shortly to what I have called the "Ascher" correspondence, which will be found in Exhibit J. P. M. 10 to the affidavit of the procurator general. This was a series of intercepted letters written from Hamburg by Ascher & Co. to the last-named claimants—Cudahy & Co.—some before the seizures and others afterwards.

Ascher letters intercepted.

I read them for general information as to the circumstances in which it was known the trade in conditional contraband was carried on; and I find in them cogent corroboration of many facts and inferences already I think sufficiently established without them.

They sound almost like a talk between merchants "on change" relating to a trade rendered interesting through the commercial risks which its manipulation involved. If the correspondence could have been completed by the inclusion of the letters from America in reply, it would have been still more elucidating.

The letters show an intimate knowledge of what was being done by the various shippers in reference to consignments of foodstuffs to Copenhagen; of the difficulty of exportation from Denmark to Germany; and of the probable fate of some of the cargoes now before the court.

It was objected that they could not be evidence against any persons other than Ascher & Co. and Cudahy & Co., and that they ought not to be read in any of the other cases. If they stood alone, I should not act upon them as affecting those cases. But it must be remembered that prize courts are not governed or limited by the strict rules of evidence which bind, and sometimes unduly fetter, our municipal courts. Such strict evidence would often be very difficult to obtain, and to require it in many cases would be to defeat the legitimate rights of belligerents.

Prize court evidence.

Prize courts have always deemed it right to recognize well-known facts which have come to light in other cases, or as matters of public reputation.

In the case of the *Rosalie and Betty*[30] Lord Stowell discussed the subject generally, and said: "In consider-

Stowell's opinion.

[30] (1800) 2 C. Rob. 343.

ing this case I am told that I am to set off without any prejudice against the parties, from anything that may have appeared in former cases; that I am not to consider former cases, but to consider every case a true one, until the fraud is actually apparent. This is undoubtedly the duty in a general sense of all who are in a judicial situation; but at the same time they are not to shut their eyes to what is generally passing in the world." Then he refers to well-known facts and expedients relating to illegal trading and fraudulent practices during war, and adds: "Not to know these facts as matters of frequent and not unfamiliar occurrence would be not to know the general nature of the subject upon which the court is to decide; not to consider them at all would not be to do justice."

Civil War cases.

I will pause only to give one illustration from the American authorities. In the judgment in the *Stephen Hart* [31] the court read from a statement by the solicitor general (Sir Roundell Palmer) in the House of Commons relating to the contraband trade between England and America by way of Nassau in the following passage:

"The then solicitor general of England (Sir Roundell Palmer) stated in the House of Commons on June 29 last, referring to the cases of the *Dolphin* and the *Pearl*, decided by the district court for Florida * * * that it was well known to everybody that there was a large contraband trade between England and America by way of Nassau; that it was absurd to pretend to shut their eyes to it; and that the trade with Nassau and Matamoras had become what it was in consequence of the war"; and the learned judge in the same case in another passage said: "The cases of the *Stephen Hart*, the *Springbok*, the *Peterhoff*, and the *Gertrude* illustrate a course of trade which has sprung up during the present war, and of which this court will take judicial cognizance, as it appears from its own records and those of other courts of the United States, as well as from public reputation."

Weight of Ascher letters.

The "Ascher" letters having been written to one of the big shippers about, and with intimate knowledge of, this trading and being obviously genuine, and indeed never intended to see the light in this court, I consider that on general principles the court was entitled to read them and so to inform itself as to this trade generally, without of course, allowing any statements in them to injuriously

[31] (1863) Blatch. Pr. Cas. 387, at pp. 403, 404.

affect any claimant, especially if there was no opportunity for him to deal with them. It is right to add, that if I had not been made acquainted with their contents, my decision in every case would have been the same; but they do give a sense of mental satisfaction in regard to inferences which have been drawn.

I will now proceed with the cases of the alleged purchaser claimants.

### AS TO THE CLAIM OF PAY & CO.

This firm claims goods to the extent of 1,710,818 pounds, shipped on the four vessels.

The shippers were Sulzberger & Sons Co., Morris & Co., and the South Cotton Oil Co.

The consignments were to the order of the shipper and in the case of Sulzberger & Co., the parties to be notified were Pay & Co.; in the case of Morris & Co., the parties to be notified were Morris & Co. of Christiania; and in the case of the South Cotton Oil Co. no parties to be notified were named.

The substantial question in this case is whether Pay & Co. were merely agents of the consignors or independent purchasers.

Agents or purchasers.

Pay & Co. say they were for many years before the war, and remained after the war, agents for Sulzbergers.

There is a conflict between their statement and that of Sulzbergers as to the agency. The latter say the agency of Pay & Co. ceased after August 1, 1914. No contracts for the purchase of the goods claimed by Pay & Co. were produced; but certain invoices were sent by them to the procurator general; and they allege that they paid for the goods. Except as to a small portion of the goods shipped by Sulzbergers on the *B. Bjornson*, and of the goods shipped by the Southern Cotton Oil Co. on the *Fridland* (of the alleged subsales of which no particulars or satisfactory evidence were given), the goods they claim were not sold before the seizure, but were, according to their account, bought for the purpose of adding to their stock to be sold and consumed in Scandinavian countries.

In the affidavits filed on behalf of the claimants it was deposed that the "drafts for all the goods were duly paid" by them.

None of the drafts were produced.

At the hearing certain letters from the bankers were produced in order to establish that payments had been made.

These documents referred to some arrangements made after the seizure. They do not show what, if any sums were paid, but refer to certain arrangements to debit, which were only book entries. I saw none of the books.

No evidence has been adduced from the bankers themselves, nor was any explanation given of the communications from Pay & Co. which led to the bankers writing the letters referred to.

It ought to have been easy for the claimants to show by documents when and how, and at what price and on what terms, they purchased the goods, if they really were purchasers on their own account, and to prove, if that was the fact, that payment was made as alleged.

The claimants aver that when the war broke out they received letters from the American slaughtering firms asking them to assist the American houses in sending goods to German buyers, but that they refused to entertain the proposition.

They do not say whether the request came from the shippers of any of the goods they now claim. They ought to have done so. The not unnatural inference is that it did.

No evidence whatever has been given by any of the consignors in regard to the goods claimed by Pay & Co.

After a careful consideration of all the circumstances, I have come to the conclusion that the claimants have not shown that the goods were sent to them as purchasers, but that they were sent to them as agents for the consignors. Even if they had intended to purchase the goods for themselves, they have entirely failed to satisfy me that they had become the owners of the goods.

### AS TO THE CLAIM OF THE PROVISION IMPORT CO.

This is a Danish company carrying on business in Copenhagen as importers and dealers in lard stock, etc.

Their direct claim is to 1,176,050 pounds of lard and oleo stock shipped on the *A. Nobel* and the *Fridland.* The shippers were Armour & Co.—the consignees Armour & Co. of Copenhagen —and the parties to be notified were the Provision Import Co.

Question of real sales.

The case for the claimants is that they bought and paid for the goods from the shippers through their agents at Copenhagen in the ordinary course of business, and that the goods were intended to and would have been disposed of in their business in Scandinavia if they had been delivered. They give particulars of subsales in Denmark and Sweden to margarine manufacturers before the seizure. These subsales comprise over 200,000 pounds of the goods—the other portion, over 900,000 pounds, they say had not been sold at the time of seizure.

The Crown's case was that the sales were not real sales, but that the Provision Import Co. were merely to deal with these goods as agents for the shippers.

There is evidence that before the war they bought goods from Armours; there is no evidence that they were ever agents for them. In the affidavit of the procurator general the Provision Import Co. were said to be the representatives of Hammond & Co. in Copenhagen; but they are not in these cases involved in any of the Hammond shipment transactions. I only find them once mentioned in the intercepted Armour cablegrams. That is on October 29, a date subsequent to those given for the purchases of the goods in question, but anterior to any seizures. That cablegram is consistent, and I think only consistent, with their being the purchasers in the case it refers to.

The documents were fairly completely produced to the court by the claimants. In my opinion the right conclusion is that the Provision Import Co. were bona fide purchasers of the goods they claim.

AS TO THE CLAIM OF CHRISTENSEN AND THOEGERSEN.

This claim is in respect of goods shipped by Morris & Co. on the *A. Nobel* and the *B. Bjornson;* by Cudahy & Co. on the *A. Nobel* and the *Fridland;* and by Armour & Co. on the *Fridland.* The shipments were all, therefore, before the order in council of October 29, 1914.

Agents or purchasers.

The main question as to these goods is whether they were sent to the claimants as selling agents for the shippers, or as purchasers on their own account.

The affidavits of Mr. Thoegersen, the sole proprietor of the firm, acknowledge that they sometimes acted as agents, but say that these particular goods were sold to, and bought by, them as purchasers, and that as to the greater part of the goods, the claimants had sold them

to their own customers in Denmark, Sweden, and Norway, some before the sea voyage commenced, and others during transit. Particulars of these subsales were given.

The Ascher correspondence throws some light on the situation as between Christensen and Thoegersen and Cudahy & Co.

I am now going to refer to the Ascher correspondence as being helpful to some of the claimants.

Ascher correspondence.

In a letter dated November 25, 1914, Ascher writes: "We are glad you have been able to do so heavy a business with Messrs. Christensen and Thoegersen, and of a portion of it they have already reaped the benefit, for we have been informed that heavy lines of lard of your brand have been already distributed amongst German buyers, particularly in the east by way of Stettin. How they will fare with subsequent shipments is problematical, for the fate of the S. S. *A. Nobel* is still quite uncertain."

And in a later letter (January 6 last): "As for Christensen and Thoegersen they are said to have made so much money out of the war, that even a big loss would not be greatly felt by them, if the *Nobel* should be permanently lost. This, however, we think is out of the question so far as neutral owners of the cargo are concerned."

I can not doubt that Christensen and Thoegersen did sell large quantities to Germany of goods imported from the American meat packers.

It is sworn that the drafts which appear by the documents to have been drawn by the shippers on the claimants were duly paid. I should have desired better evidence upon this point; but the dispute really is not whether the title to the ownership of the goods had passed, but whether in these particular transactions the claimants were acting merely as agents, or intermediaries for the consignors, or were purchasers. The passages I have read from the Ascher letters are more consistent with their being purchasers; and upon the whole the conclusion to which I have come is that the goods claimed were shipped to them as bona fide purchasers, and not as agents.

AS TO THE CLAIM OF BRÖDR LEVY.

This firm of merchants ("dealers in herrings, codfish, and provisions") claims lard and fatbacks, shipped by Morris & Co. to their own order respectively.

The proofs in this case are not satisfactory. The goods comprised in bill of lading 11 on the *Kim* are also claimed by Morris & Co.; and those in bill of lading 62 on the *Kim* are also claimed by Armour & Co. The goods claimed from the *A. Nobel* are said to have been bought from Conrad Bang, an agent for Morris & Co. at Copenhagen, and from Backstrom, their agent at Stockholm.

Nature of transaction.

An alleged copy of invoice, dated October 26, 1914, was exhibited, which says the goods were intended for the *A. Nobel* (which had sailed six days before), and that they had been war insured at Copenhagen. In relation to all the goods claimed there is a bare statement that payment was made without any dates, amounts, or particulars whatsoever. The claimants did not produce any of the shipping documents. No affidavits were made by Bang or Backstrom or by any one from Armour's Copenhagen office. The claimants do not say whether they had dealt in lard or fatbacks before or not. No dates appear on the invoices. The shippers who are said to have been paid also lay claim to close on half of the goods. Altogether the proofs are deficient, and I am not satisfied that the goods claimed were sold to the claimants, or that they had paid for the goods, or become the owners thereof; and the claim fails.

As to the goods also comprised in the claims of Morris & Co. and Armour & Co., they must be treated, therefore, as having been shipped by the shippers to their own order, and remaining their property at the time of seizure.

### AS TO THE CLAIMS OF VILHELM ELWARTH.

Mr. Elwarth has put forward two claims: (1) One dated April 10, 1915, to 61,000 pounds of lard shipped by Cudahy & Co. on the *A. Nobel*—to their own order—party to be notified, Ernst Ascher & Co. of Rotterdam; and (2) the other dated June 1, 1915, to 88,618 pounds of oleo oil, shipped on the same vessel by the Consolidated Rendering Co., of Brightwood, Mass.—to their own order—with the same party to be notified.

It is necessary to investigate closely the position of Vilhelm Elwarth. He was described in the affidavit of the procurator general as the agent in Copenhagen of E. Ascher & Co., of Hamburg. In his affidavit in reply he does not deny that, although he denies agency qua the particular transaction. In his affidavit of May 15, in

Ascher & Co.'s agent.

support of the first claim, he said he carried on business in Copenhagen as a provision merchant with a large number of retail dealers as customers. In that of June 14, in support of the second claim, he has become an import merchant frequently importing into Denmark, among other things, oleo oil. His case is that he bought both the lard and the oleo oil at different times from Ernst Ascher & Co., of Rotterdam. The latter are agents for E. Ascher & Co., of Hamburg. He alleges that he bought the lard verbally on September 26 on a personal visit of some one to him at Copenhagen; that payment was to be by draft against documents; and that "in due course" he paid for the said goods and took up the documents. The draft was not produced, and no dates or further particulars of payment are given. The oleo oil he says he bought verbally at Rotterdam on July 25 and 28, 1914; and that payment was to be by net cash. The documents purporting to be invoices for all the goods bear date November 3. No explanation was given of how the claim to the goods comprised in the earlier contract was not made till a couple of months after the claim to the goods the subject matter of the later contract.

The Ascher letters, written by his principals, throw light upon the lard transaction, and upon the rest of Elwarth's claim. It will be remembered that evidence was given, and not contradicted, that he was Ascher's agent at Copenhagen. In a letter to Cudahy of November 7, Ascher & Co., of Hamburg, appear to treat the lard as having been their property. They say, "Nor are we sure that the war risk on the 500 half-barrels of pure lard on board the steamship *Alfred Nobel* had been taken out by your good selves, not having received a debit note of the charge up to the present." Later, in the same letter, they say that it had been sold by their Rotterdam office "to a Danish firm." These were the consignments of lard claimed by Elwarth.

Elwarth is not named, although he was well known; and it is doubtful whether he was the person referred to, as he does not appear to be a member of any "firm."

After the capture of the *A. Nobel* they write (November 20) that they were interested both in the lard and oleo oil: "We are watching the development with much interest, although we ourselves are interested only with those 500 half-barrels of lard of yours, and a couple of hundred tierces of oleo, both of which we are happy to say are

fully covered against war risk, so that in the worst of cases we can not lose much." Those were all the goods claimed by Elwarth. They had in the meantime also suggested that consignments to them should be made ostensibly to Elwarth. They wrote: "We suppose if Rotterdam were to cable you 'Ship sales Elwarth,' you would understand that this meant a request to have our purchases forwarded to Copenhagen either to the address of our agent at that city, Mr. Vilhelm Elwarth, or to your order, party to be notified, Vilhelm Elwarth, Copenhagen. It might be right also in that case for you to invoice the goods to Mr. Elwarth, handing on a copy of the invoice simultaneously."

The correspondence refers frequently to Elwarth, and it contains a testimonial to his assiduity and fidelity as an instrument of Ascher & Co., Hamburg, since the beginning of the war, in these words:

"We repeat that we consider ourselves responsible for any shipments you may be making to Mr. Elwarth during this period, and we are glad to say he has proved himself entirely reliable in all transactions which we had to let go through his hands since the beginning of the war."

I have come to the conclusion that the claim made by Elwarth is not a bona fide claim on his own behalf. He was not a purchaser from Ascher & Co. of Rotterdam, or of Hamburg. He was merely a nominee of theirs. The goods are not claimed by any person entitled to them, and therefore they stand to be treated as goods unclaimed.

### AS TO THE CLAIM OF PETER BUCH & CO.

A claim was put in on behalf of this firm to goods covered by bills of lading on three of the vessels, as follows:

On the *B. Bjornson*, BB/L. 178 to 186, and 188;

On the *Fridland*, BB/L. 62 to 65, and 78; and

On the *Kim*, BB/L. 95 to 97, and 128–131.

The total quantity of the goods thus claimed was 752,908 pounds. They were all shipped by Hammond & Co. to their own order.

Lack of evidence.

Although the claim was entered, no evidence whatsoever was adduced, nor was any document produced in support of it. Counsel appeared for some underwriters in the names of Buch & Co., but had not been supplied with any documents or materials. (It should be noted

that when Mr. Cave referred to an affidavit relating to goods on the *Fridland* (B/L. 61) as if it was one by the present claimants, there is a confusion; that affidavit related to another claim by C. Bunchs, Fedevareforretning.)

The evidence for the Crown was that Peter Buch & Co., of Copenhagen, were very large exporters of provisions to Germany, and were a branch of the firm of that name in Hamburg. The shippers gave no evidence as to these shipments.

As no evidence was adduced in support of the claim, it necessarily fails.

AS TO THE CLAIM OF J. O. HANSEN.

The subject matter of this claim is a quantity of lard and fatbacks amounting to 400,625 pounds. Mr. Hansen says he is a Danish dealer in such goods.

He claims four parcels of goods—one parcel each on the *B. Bjornson*, *Fridland*, and *Kim*, consigned by Morris & Co. to their own order; and another parcel on the *Kim* consigned by Armour & Co. to their own order.

The goods shipped by Morris he alleges he bought from Erik Valeur; those by Armours from their Copenhagen office. He adds a schedule purporting to give a list of his alleged purchases and resales; but he did not produce a single document relating to any of the transactions; no contract, invoice, bill of lading, draft, receipt, account, or anything else. No explanation or excuse was made for this. Erik Valeur was the representative in Copenhagen of Morris & Co. He made an affidavit in support of his own claim, to which reference may be made by way of criticism of this claim. He alleged that he bought some goods for Morris on his own account, and sold others as agent. How he came to decide which was which he did not explain. The goods claimed by Hansen on the *B. Bjornson*, Valeur says, he bought on his own account. The sale to Hansen, he says, was on September 30, although Valeur himself says he only bought on October 6.

No evidence.

Hansen has entirely failed to show that he was the purchaser or owner of any of the goods. His claim is quite unsupported, and I can not accept it.

AS TO THE CLAIM OF SEGELCKE & CO.

Mr. Eilert Segelcke, the sole proprietor of this firm of wholesale dealers in lard and bacon in Copenhagen,

claims 275,297 pounds of lard and fatbacks shipped by Morris & Co. on the *B. Bjornson* and the *Kim* to their own order. The claimants say they bought the goods partly through Valeur and partly through Conrad Bang (agents for Morris & Co.). Bona fide purchasers.

According to the affidavit of Eilert Segelcke sworn May 18, 1915, the various goods were paid for at different times.

I am prepared to accept the account given by Segelcke as accurate. Accordingly I find that his firm were bona fide purchasers of the goods they claim.

AS TO THE CLAIM OF PEDERSEN FOR THE FAELLESFORENINGEN FOR DENMARKS BRUGSFORENINGER.

This is a claim to 45,219 pounds of neutral lard shipped on the *B. Bjornson* by Morris & Co. to their own order.

The goods are also claimed by Morris & Co. themselves.

In the affidavit of Pedersen of March 19 it is deposed that the goods were bought for the purpose of keeping up the stock so that the firm could comply with orders for margarine "from the members."

No document is produced. The deponent does not even state from whom the goods were bought, or what the date of the alleged purchase was; and he does not allege that any payment was made. In a subsequent formal claim (April 9, 1915) the grounds of claim state that the goods were bought from Erik Valeur, who in the first instance had himself bought the goods at an agreed price, c. i. f. Copenhagen, and had taken up the documents and paid for the goods. On looking at Valeur's own account in his affidavit the statement is, not that he had bought or paid for the goods, but that he sold them to Pedersen's firm as agent for Morris & Co. Unsatisfactory proof.

In these circumstances the claimant's proof is quite unsatisfactory; and accordingly, particularly as Morris & Co. themselves also claim the goods, I decide that Pedersen's firm have failed to establish their claim. So far as they are comprised in the claim of Morris & Co. they fall to be treated as goods which remain unsold.

AS TO THE CLAIM OF HENRIQUES AND ZOYDNER.

This firm claims 81,096 pounds of lard shipped on the *B. Bjornson* by Morris & Co. to their own order. The affidavit in support of the claim contains the bare state-

ment that this lot was purchased for the purpose of keeping up the firm's stock. There is no statement as to the persons from whom the purchase was made, what its terms were, what the purchase price was, or that the price, whatever it was, was ever paid. In a subsequent formal claim (unsworn) the grounds of claim state that the goods were purchased from Mr. Erik Valeur; that Valeur had in the first instance purchased the goods at an agreed price, c. i. f. Copenhagen, and that the documents therefor had been previously taken up and paid for by him. This statement is in direct contradiction to that of Valeur himself (in the affidavit already referred to), where he says he sold these goods merely as agent for Morris & Co.

Conflicting testimony.

My conclusion is that the claim of this firm has not been established.

AS TO THE CLAIM OF FRIGAST.

This is a claim to 15,750 pounds of lard shipped by Armour & Co. on the *B. Bjornson*, and consigned to their own order. Mr. Frigast is a provision merchant at Copenhagen, and claims the goods under purchase through Armour & Co., of Copenhagen, on November 19 for the purpose of his business. He produced satisfactory documents, and I accept his account of the transaction as a real and bona fide transaction of purchase, and find that he had become the owner of the goods, and that he purchased them to be used in his own business.

Bona fide purchaser.

AS TO THE CLAIM OF THE KORSOR MARGARIN FABRIK, A/S.

This firm claims one lot of 30 tierces of oleo stock laden on the *Fridland*, and another lot of 30 tierces of oleo oil laden on the *Kim*. The shippers were Morris & Co. to their own order at Christiana. They themselves also claim the first lot. The claimants say the goods were first bought by Erik Valeur, at an agreed price c. i. f. Copenhagen, and that they in turn bought from Valeur. They do not say when they bought, what the price was, or that any payment has been made. Valeur himself does not say he purchased the goods and resold them, but that he sold as agent for Morris & Co. A declaration of the claimants of March 19, 1915, that the goods would be consumed in Denmark states that they were purchased from Morris & Co. through Erik Valeur. The evidence

Not established.

in support of the claim is quite unastisfactory, and I find the claim has not been established. The result is that the goods on the *Fridland* which are also claimed by Morris & Co. must be treated as goods of Morris & Co. unsold; and the goods on the *Kim* as goods unclaimed by any person entitled as owner.

AS TO THE CLAIM OF THE MARGARINEFABRIK DANIA.

This is a small claim to 9,004 pounds of lard on the *Fridland*, shipped by Morris & Co. and consigned to their own order at Christiania. The goods are also claimed by Morris & Co. themselves.

The case is to all intents identical with the Korsor claim just dealt with, except that in this case Valeur states he bought them first on his own account and sold them on the same day. They were invoiced after the seizure. Not established.

I find that the claim has not been established.

THE CLAIM OF C. BUNCHS FED.

The claimants are a Danish company. The claim is to a parcel of beef tongues (3,371 pounds), shipped on the *Fridland* by Hammond & Co., consigned to their own order, naming Christensen and Thoegersen as the "parties to be notified."

The company say they bought the goods from Christensen and Thoegersen. They produced the bill of lading and priced invoice from Christensen and Thoegersen, and it is sworn they took up the documents. The invoice was sent two days after the seizure. Whether when it was sent the seizure was known does not appear. Bona fide purchaser.

On the whole I have come to the conclusion that this is a bona fide claim to goods bought to be dealt with in Denmark; and the claim is therefore allowed.

AS TO THE CLAIM OF ERIK VALEUR.

This is a claim to 106,155 pounds of oleo stock laden on the *Kim*.

The shipment was by Morris & Co. to their own order at Copenhagen—the parties to be notified being the Morris Packing Co. of Christiania.

Mr. Valeur was the representative of Morris & Co. at Copenhagen. He said his agency comprehended Denmark only. He alleges that certain of the consignments

by Morris (many of which have already been referred to) were sent to him for sale as agent, in Denmark; and that if he wished to sell goods to Germany, or German buyers, he would have to buy them for his own account. The goods he now claims he says he bought on his own account, and I suppose they were therefore goods he intended to send to Germany. I am not satisfied that they were. They were said to have been invoiced to him some days after the capture of the last of the first three vessels.

Not established. I find that he has no ground whatever for his allegation that he was the owner of the goods.

THE CLAIM OF CHRISTIAN LOEHR.

This claim is for 41,952 pounds of lard alleged to have been bought from the Provision Import Co. This parcel was shipped on the *Alfred Nobel* and consigned by Rumsay & Co. to their own order, the Provision Import Co. being the parties to be notified. In dealing with the direct claim of the latter I mentioned that certain goods shipped for them had been resold.

Bona fide purchaser. Mr. Loehr is a Dane, and is the British vice consul in Denmark. He produced his documents, and I see no reason to doubt the bona fides or the reality of his purchase as one made for the purposes of his business in Denmark.

AS TO THE CLAIM OF J. ULLMAN & CO.

The subject matter of this claim consists of certain rubber of various kinds; 347 cases (133,209 pounds) were shipped on the *Fridland*, and 218 cases (44,428 pounds) on the *Kim*. The consignors were Edward Maurer & Co., and the consignees "J. Ullman & Co., Copenhagen."

Rubber. Rubber was declared conditional contraband on September 21, and absolute contraband on October 29, 1914.

At the time of the shipment on the *Fridland*, therefore, rubber was conditional contraband, and at that on the *Kim* it was absolute.

Exportation of rubber of this kind from Denmark was prohibited on October 22, before either of the shipments. Jacques Ullman had up to the time of the war carried on business as a merchant in rubber and other articles at Hamburg.

It was stated for the Crown that he was a German; but this was a mistake, as it was established that he was

born a Swiss and had remained a Swiss subject. After the war he gave up his Hamburg business and began trading in Denmark. He, with his wife, formed a Danish company, "J. Ullman & Co.," on October 24, 1914.

"Gum."

The transactions relating to the goods claimed were attacked by the Crown on the ground that the rubber was falsely described in the ship's papers as "gum" with the object of misleading, and on the ground that the *Fridland* shipment was confiscable as conditional contraband because it was destined for the enemy country and for the use of the enemy Government; and the *Kim* shipment as absolute contraband on the ground of destination for the enemy country.

The goods were invoiced as rubber. Much evidence was given on both sides upon the question whether "gum" was an accurate or a false description of the goods. After weighing the evidence I have come to the conclusion that it was not an accurate commercial description, and that its use in the manifest instead of the appropriate commercial description of "rubber," or various qualities of rubber by their commercial names, was adopted in order to avoid the inconvenience or difficulties which would result from a search and possible capture.

Deception.

Any concealment or misdescription, or device calculated and intended by neutrals to deceive and to hamper belligerents in their undoubted right of search for contraband, will, while I sit in this court, weigh heavily against those adopting such courses when any presumptions or inferences have to be considered. Neutrals are expected to conduct their neutral trade during the war not only without having recourse to fraud, or false papers, but with candor and straightforwardness. As has been said by the American Supreme Court, "Belligerents are entitled to require of neutrals a frank and bona fide conduct." It will not be found against their interest to pursue such conduct; but in investigating attempts to mislead by misdescription or otherwise, care must be taken to ascertain who have taken part in such attempts, and to what extent.

In the present case I find upon the facts that the misdescription of the rubber as "gum" in the manifest was due in the main to Gans & Co.—the charterers of the vessels. Copies of the invoices with the correct description of rubber were given to Gans & Co. for the purpose of the manifest which was to be made out by them. Maurer

& Co. no doubt acquiesced in this because otherwise they would probably have lost the benefit of the freight contract which they had made early in October; but I do not find that the claimants, the consignees, ever suggested or took any part in this. I do not find that they were aware of the description used until after the *Fridland* sailed. There was read against them a passage in a cablegram of October 31, "Expect you informed Bruno (the insurer) everything shipped as gum." The explanation of Ullman that this was because of a cablegram he received on October 28 is, I think, sufficient. Similarly I do not find that they were responsible for the misdescription of their cargo on the *Kim*.

Lawful market.

I have examined the commercial documents, and considered very carefully the cablegrams set out in Exhibit J. P. M. 1 (many of which, however, do not affect the claimants), and the letters and cablegrams exhibited to Ullman's second affidavit—and even if they are approached in an attitude of suspicion created by some of the surrounding circumstances, I can not arrive at the inference that the rubber was on its way to an enemy destination when it was seized; on the contrary, my conclusion from the evidence is that the sale to Ullman, and the purchase and payment by him, were honest business transactions, and that he intended to add the rubber to his stock in his Denmark business, and to dispose of it in Scandinavia in the very profitable market described in his letters, which was created greatly by the stoppage to Scandinavia of all exports of rubber from or through Germany.

A very full and strict undertaking was given on the part of Ullman & Co. in the course of these proceedings. That must be adhered to. I need not trouble further about other undertakings given in the course of this case, except to say that they must be adhered to.

### THE CLAIM OF W. T. BAIRD.

This relates to 39 cases (29,771 pounds) of rubber shipped on the *Kim* on November 11 (about a fortnight after rubber was declared absolute contraband) by Baird, and consigned to Fritsch.

It stands upon a different footing from the last, as the claimant is the shipper. There are three people concerned: Baird, and Frankfurter, in America, and Fritsch at Landskrona in Sweden. Fritsch was the German

vice consul at Sweden, and a forwarding agent. Baird claims as the owner.

The transaction is not made as clear as it could and should have been. Counsel at the hearing stated it thus:

"Mr. Baird sold these 39 cases of rubber to Mr. Frankfurter, who was also a rubber broker in New York, and he in turn sold it to Mr Fritsch."

Consignment to enemy representative.

The claimant, Baird, deposed that the contract for the sale of the said goods was made between Frankfurter and the Rubber Trading Co., of which Baird was president; and that, at the time of such sale, he was requested by Frankfurter to make the shipment to W. Fritsch, "who (he says) was the principal for whom Frankfurter was acting." Frankfurter exhibits an order which he received from Fritsch—pursuant to this order (according to his affidavit) he entered into a contract with Baird "for the purpose of the rubber." No contract or invoice has been produced; the only documents placed before the court are the letter from Fritsch to Frankfurter, and a copy of the bill of lading. Two bills of lading were given—both of these were sent to Fritsch, according to Baird's statement. He does not say by whom they were sent. Whether Fritsch dealt with them, or what has become of them, the court was not informed. Baird does not say that any right to dispose of the goods was reserved on the sale to Frankfurter, or to Fritsch, or when the two original bills of lading were sent. Frankfurter throws no light upon this; and Fritsch has not given any evidence or made any deposition.

I am not satisfied that Baird has made out his claim to be owner of the goods, or that any property remained in him after the shipment. There are, moreover, some other matters to which I must advert in connection with the claim. As to the description of the rubber as "gum," he gave no explanation in his affidavit; but he allowed it to be understood as having been done in the ordinary course of business, for all he says about it is, "I have been engaged in buying and selling rubber for 40 years in the city of New York, and I have always understood the terms 'gum' and 'rubber' to be interchangeable terms in the trade, and have frequently known of rubber being described as 'gum.'"

In a letter of January 28 he wrote that he could not give any instance of crude rubber having been shipped under the name of "gum."

Later on the Rubber Club of New York, of which he was a member, appears to have asked Mr. Baird to give them an explanation of the transaction. His answer took the form of a statement made and certified before a notary public on March 24, 1915. There he said the contract was entered into on October 29, 1914, with Frankfurter, and the goods were sold to him. Fritsch of Landskrona is not mentioned. Frankfurter is said to have given assurance that the rubber was for Danish consumption. Fritsch was a merchant in Sweden, and that is not the assurance he is said to have given. As to the way in which the rubber was described, he said that the instruction to his shipping clerk to ship it as "gum" was given by Frankfurter, and that he had since been told by Frankfurter that the Gans Line suggested that denomination. Frankfurter does not deal with any of this in his affidavit made two months later. Baird was therefore a party to this misleading description.

Rubber contraband.

Taking the whole circumstances into consideration, I am justified in drawing the inference that the rubber was on its way to enemy territory through Fritsch, the German consul; and even if the claimant had made out his claim to be the owner, I find that the rubber was confiscable as absolute contraband.

AS TO THE CLAIM OF MARCUS & CO.

This claim refers to 99 bales of hides (18,968 pounds) shipped on the *Kim* on November 11.

Hides were declared conditional contraband on September 21, 1914.

The consignors were Amsinck & Co., of New York, and the consignees Marcus & Co., of Copenhagen. The latter are hide merchants dealing largely with Hamburg. The claim alleges that the goods were purchased from Goldtree, Liebes & Co., of Santa Ana, El Salvador, on terms c.i.f. Copenhagen, cash to be paid on receipt of goods. It was also alleged that the goods had been paid for by the claimants. No proof of payment was given; and it would be strange if the goods were paid for before seizure, when payment was only due on receipt of the goods. Goldtree, Liebes & Co. were also merchants at Hamburg. The goods were insured by Hamburg offices. On reference to the exhibit set out in J. P. M. 11, it will be seen that the claimants were a firm having active dealings, after the war, with Hamburg.

Amsinck & Co., the consignors, were shown to have sent under cover to a bank in Christiania a lot of letters to be sent on to Germany, addressed to various people in Hamburg and Berlin, which were to have been reposted as if they had been sent from Christiania. Among such letters, which were intercepted, was one to Goldtree, Liebes & Co., of Hamburg, of June 5, 1915, relating to this very parcel of hides, in which they express the hope that the goods have arrived, and refer to Goldtree's "friends in Copenhagen," meaning, without doubt, Marcus & Co., the claimants. Intercepted letters.

No evidence was given as to what was done with the bill of lading.

As the goods were consigned c.i.f. to Copenhagen and were to be paid for on receipt of the goods, and as the goods were never received by the consignees, and no satisfactory evidence was given of the alleged payment, I am not satisfied that the goods ever were the property of the claimants as alleged. Besides, the proper inference from such evidence as was adduced is, in my opinion, that Marcus & Co. in Copenhagen were merely intermediaries between Goldtree, Liebes & Co., of Santa Ana, and Goldtree, Liebes & Co. of Hamburg, to whom the goods were really destined at the time of seizure. Title doubtful.

THE CLAIMS OF THE GUARANTY TRUST CO. OF NEW YORK.

These are the last claims I have to deal with. They relate to wheat and flour on the *A. Nobel*, the *B. Bjornson*, and the *Fridland*.

In the first, the Trust company are associated with Newman & Co.; in the second, with Norris & Co.; and in the third, partly with Norris & Co.

The facts in these cases were not sufficiently placed before the court; and there was no argument upon them on behalf of the Crown. Facts insufficient.

They must be further dealt with by the Crown and the claimants before the court can dispose of them.

I must accordingly adjourn them for further argument.

The details of all the claims have now been set out. I am very sorry it has taken so long, but it must be remembered that I had to deal with, not one case, but, I think, 25 cases. Twenty-five cases.

Character of cargoes.

With regard to the general character of the cargoes, evidence was given by persons of experience that all the foodstuffs were suitable for the use of troops in the field; that some, e. g., the smoked meat or smoked bacon, were similar in kind, wrapping, and packing to what was supplied in large quantities to the British troops, and were not ordinarily supplied for civilian use; that others, e. g., canned or boiled beef in tins, were of the same brand and class as had been offered by Armour & Co. for the use of the British forces in the field; and that the packages sent by these ships could only have been made up for the use of troops in the field. As against this, there was evidence that goods of the same class had been ordinarily supplied to and for civilians.

Lard as food.

As to the lard, proof was given that glycerine (which is in great demand for the manufacture of nitroglycerine for high explosives) is readily obtainable from lard. Although this use is possible, there was no evidence before me that any lard had been so used in Germany; and I am of opinion that the lard comprised ought to be treated upon the footing of foodstuffs only. It is largely used in German army rations.

As to the fatbacks (of which large quantities were shipped), there was also proof that they could be used for the production of glycerine. Mr. Perkin, in his affidavit in answer to that of Mr. George Stubbs, of the British Government laboratory (which dealt with lard and fatbacks as materials out of which glycerine was producible), confines his observations to lard; and passes by entirely what had been deposed as to fatbacks. In fact no evidence as against that of Mr. Stubbs was offered for the shippers of fatbacks. Mr. Nuttall, a deponent for one of them, Sulzberger & Sons Co., says the fatbacks shipped by them were not in a condition which was suitable for eating; but he may have meant only that they required further treatment before they become edible.

Fatbacks ancipitis usus.

There was no market for these fatbacks in Denmark. The procurator general deposed as a result of inquiries that the Germans were very anxious to obtain fatbacks merely for the glycerine they contain. In these circumstances it is not by any means clear that fatbacks should be regarded merely as foodstuffs in these cases, and in the absence of evidence to the contrary, it is fair to treat

them as materials which might either be required as food, or for the production of glycerine.

The convenience of Copenhagen for transporting goods to Germany need hardly be mentioned. It is in evidence that the chief trade between Copenhagen and Germany since the war was through Lubeck, Stettin, and Hamburg.

Military bases.

The sea-borne trade of Lubeck has increased very largely since the war. It was also sworn in evidence that Lubeck was a German naval base. Stettin is a garrison town, and is the headquarters of army corps. It has also shipbuilding yards where warships are constructed and repaired. It is Berlin's nearest seaport. It will be remembered that one of the big shipping companies asked a Danish firm to become nominal consignees for goods destined for Stettin. Hamburg and Altona had ceased to be the commercial ports dealing with commerce coming through the North Sea. They were headquarters of various regiments. Copenhagen is also a convenient port for communication with the German naval arsenal and fortress of Kiel and its canal, and for all places reached through the canal. These ports may properly be regarded, in my opinion, as bases of supply for the enemy, and the cargoes destined for these might on that short ground be condemned as prize; but I prefer, especially as no particular cargo can definitely be said to be going to a particular port, to deal with the cases upon broader grounds.

Before stating the inferences and conclusions of fact, it will be convenient to investigate and ascertain the legal principles which are to be applied according to international law, in view of the state of things as they were in the year 1914.

International law.

While the guiding principles of the law must be followed, it is a truism to say that international law, in order to be adequate, as well as just, must have regard to the circumstances of the times, including "the circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it;" vide the *Jonge Margaretha*.[32]

Two important doctrines familiar to international law come prominently forward for consideration; the one is embodied in the rule as to "continuous voyage," or continuous "transportation;" the other relates to the ultimate hostile destination of conditional and absolute contraband, respectively.

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[32] (1799) 1 C. Rob. 189; and Chancellor Kent's Commentaries, p. 139.

Continuous voyage.

The doctrine of "continuous voyage" was first applied by the English prize courts to unlawful trading. There is no reported case in our courts where the doctrine is applied in terms to the carriage of contraband; but it was so applied and extended by the United States courts against this country in the time of the American Civil War; and its application was acceded to by the British Government of the day; and was, moreover, acted upon by the International Commission which sat under the treaty between this country and America, made at Washington on May 8, 1871, when the commission, composed of an Italian, an American, and a British delegate, unanimously disallowed the claims in the *Peterhoff*[33], which was the leading case upon the subject of continuous transportation in relation to contraband goods. (The other well known American cases—e. g., the *Stephen Hart*,[34] the *Bermuda*,[35] and the *Springbok*,[36]—considered and applied the doctrine in relation to attempted breaches of the blockade.)

I am not going through the history of it, but the doctrine was asserted by Lord Salisbury at the time of the South African War with reference to German vessels carrying goods to Delagoa Bay, and as he was dealing with Germany, he fortified himself by referring to the view of Bluntschli as the true view as follows: "If the ships or goods are sent to the destination of a neutral port only the better to come to the aid of the enemy, there will be contraband of war, and confiscation will be justified."

It is essential to appreciate that the foundation of the law of contraband, and the reason for the doctrine of continuous voyage which has been grafted into it, is the right of a belligerent to prevent certain goods from reaching the country of the enemy for his military use.

Neutral traders, in their own interest, set limits to the exercise of this right as far as they can. These conflicting interests of neutrals and belligerents are the causes of the contests which have taken place upon the subject of contraband and continuous voyages.

A compromise was attempted by the London Conference in the unratified declaration of London. The doc-

[33] (1866) 5 Wall. 28.
[34] Blatch. Pr. Cas. 387.
[35] (1865) 3 Wall. 514.
[36] (1866) 5 Wall. 1.

Declaration of London.

trine of continuous voyage or continuous transportation was conceded to the full by the conference in the case of absolute contraband, and it was expressly declared that "it is immaterial whether the carriage of the goods is direct, or entails transshipment, or a subsequent transport by land."

Conditional contraband.

As to conditional contraband, the attempted compromise was that the doctrine was excluded in the case of conditional contraband, except where the enemy country had no seaboard. As is usual in compromises, there seems to be an absence of logical reason for the exclusion. If it is right that a belligerent should be permitted to capture absolute contraband proceeding by various voyages or transport with an ultimate destination for the enemy territory, why should he not be allowed to capture goods which, though not absolutely contraband, become contraband by reason of a further destination to the enemy Government or its armed forces? And with the facilities of transportation by sea and by land which now exist the right of a belligerent to capture conditional contraband would be of a very shadowy value if a mere consignment to a neutral port were sufficient to protect the goods. It appears also to be obvious that in these days of easy transit, if the doctrine of continuous voyage or continuous transportation is to hold at all, it must cover not only voyages from port to port at sea, but also transport by land until the real, as distinguished from the merely ostensible, destination of the goods is reached.

Secretary Bryan's reply to Senator Stone.

In connection with this subject, note may be taken of the communication of January 20, 1915, from Mr. Bryan, as Secretary of State for the United States Government, to Mr. Stone, of the Foreign Relations Committee of the Senate. It is, indeed, a State document. In it the Secretary of State, dealing with absolute and conditional contraband, puts on record the following as the views of the United States Government:

"The rights and interests of belligerents and neutrals are opposed in respect to contraband articles and trade. * * * The record of the United States in the past is not free from criticism. When neutral, this Government has stood for a restricted list of absolute and conditional contraband. As a belligerent, we have contended for a liberal list, according to our conception of the necessities of the case.

"The United States has made earnest representations to Great Britain in regard to the seizure and detention of all American ships or cargoes bona fide destined to neutral ports. * * * It will be recalled, however, that American courts have established various rules bearing on these matters. The rule of 'continuous voyage' has been not only asserted by American tribunals, but extended by them. They have exercised the right to determine from the circumstances whether the ostensible was the real destination. They have held that the shipment of articles of contraband to a neutral port 'to order' (this was of course before the order in council of October 29), from which, as a matter of fact, cargoes had been transshipped to the enemy, is corroborative evidence that the cargo is really destined to the enemy instead of to the neutral port of delivery. It is thus seen that some of the doctrines which appear to bear harshly upon neutrals at the present time are analogous to or outgrowths from policies adopted by the United States when it was a belligerent. The Government, therefore, can not consistently protest against the application of rules which it has followed in the past, unless they have not been practiced as heretofore. * * * The fact that the commerce of the United States is interrupted by Great Britain is consequent upon the superiority of her navy on the high seas. History shows that whenever a country has possessed the superiority our trade has been interrupted, and that few articles essential to the prosecution of the war have been allowed to reach its enemy from this country."

It is not necessary to dilate upon the history of the doctrine in question.

I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage, or transportation, both in relation to carriage by sea and to carriage over land, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognized legal decisions, and with the view of the great body of modern jurists, and also with the practice of nations in recent maritime warfare.

Ultimate destination.

The result is that the court is not restricted in its vision to the primary consignments of the goods in these cases to the neutral port of Copenhagen; but is entitled, and bound, to take a more extended outlook in order to ascertain whether this neutral destination was merely

ostensible and, if so, what the real ultimate destination was.

As to the real destination of a cargo, one of the chief tests is whether it was consigned to the neutral port to be there delivered for the purpose of being imported into the common stock of the country. This test was applied over a century ago by Sir William Grant in the Court of Appeals in prize cases in the case of the *William*.[37] It was adopted by the United States Supreme Court in their unanimous judgment in the *Bermuda*,[38] where Chase, C. J., in delivering the judgment, said: "Neutrals may convey in neutral ships, from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country or of the port."

Another circumstance which has been regarded as important in determining the question of real or ostensible destination at the neutral port was the consignment "to order or assigns" without naming any consignee.

In the celebrated case of the *Springbok*[39] the Supreme Court of the United States acted upon inferences as to destination (in the case of blockade) on this very ground. The part of the judgment dealing with the matter is as follows:

"That some other destination than Nassau was intended may be inferred from the fact that the consignment shown by the bills of lading, and the manifest was *to order or assigns*. Under the circumstances of this trade, such a consignment must be taken as a negation that any such sale was intended to be made there; for had such sale been intended it is most likely that the goods would have been consigned for that purpose to some established house named in the bills of lading."

Consignment to order or assigns.

The same circumstance was also similarly dealt with in the *Bermuda*[40] and in the *Peterhoff*.[41]

I am not unmindful of the argument that consignment "to order" is common in these days. But a similar argument was used in the *Springbok*[39], supported by the testimony of some of the principal brokers in

[37] (1806) 5 C. Rob. 385. [38] 3 Wall. 514. [39] 5 Wall. 1. [40] 3 Wall. 514.
[41] 5 Wall. at p. 25; and see Blatch. Pr. Cas. 463, at p. 540.

London, to the effect that a consignment "to order or assign" was the usual and regular form of consignment to an agent for sale at such a port as Nassau. The British Government was petitioned to intervene for the shippers; but upon this point the British foreign office said that "no doubt the form was usual in the time of peace, but that a practice which might be perfectly regular in time of peace under the municipal regulations of a particular State, would not always satisfy the law of nations in time of war, more particularly when the voyage might expose the ship to the visit of belligerent cruisers;" and added that, "having regard to the very doubtful character of all trade ostensibly carried on at Nassau during the war in the United States, and to many other circumstances of suspicion before the court, Her Majesty's Government are not disposed to consider the argument of the court upon this point as otherwise than tenable."

Ground of suspicion.

The argument still remains good, that if shippers, after the outbreak of war, consign goods of the nature of contraband to their own order without naming a consignee, it may be a circumstance of suspicion in considering the question whether the goods were really intended for the neutral destination, and to become part of the common stock of the neutral country, or whether they had another ultimate destination. Of course, it is not conclusive. The suspicion arising from this form of consignment during war might be dispelled by evidence produced by the shippers. It may be here observed that some point was made that in many of the consignments the bills of lading were not made out "to order" simpliciter, but to branches or agents of the shippers. That circumstance does not, in my opinion, make any material difference.

Other matters relating to destination will be discussed upon the second branch of the case, namely, whether the goods were destined for Government or military use. Wherever destination comes in question, certainty as to it is seldom possible in such cases as these; "highly probable destination" is enough in the absence of satisfactory evidence for the shippers; see per Lord Stowell in the *Jonge Margaretha*.[42]

"Highly probable destination."

Upon this branch of the case—for reasons which have been given when dealing with the consignments generally,

[42] 1 C. Rob. 189, at p. 192.

and when stating the circumstances with respect to each claim—I have no hesitation in stating my conclusion that the cargoes (other than the small portions acquired by persons in Scandinavia whose claims are allowed) were not destined for consumption or use in Denmark or intended to be incorporated into the general stock of that country by sale or otherwise; that Copenhagen was not the real bona fide place of delivery; but that the cargoes were on their way at the time of capture to German territory as their actual and real destination.

The second branch of the case raises the question whether the goods, which I have decided were on their way to German territory, were destined further for the use of the German Government or departments or for milltary use by the troops, or other persons actually engaged in warlike operations, or should be presumed to be so destined in the circumstances.

As a preliminary, it becomes necessary to consider the two orders in council of August 20 and October 29, 1914.

It was contended for the claimants that before the seizure of the cargoes on the first three vessels, and while they were still on their respective voyages, the order in council of August 20 (even if it was binding on the court) had been rendered inoperative by the repeal contained in the order of October 29.

Effect of orders in council.

It was further contended that the two orders in council purporting to give effect with certain additions and modifications to the unratified "Declaration of London" had no binding effect upon this court and ought to be disregarded.

As to the first of these two contentions, no doubt if the first order had affected the substantive rights of the neutral, e. g., if it had declared an article as absolute contraband, which by the repealing order had been removed from the list of contraband before capture, it could not be said that the order had remained operative so as to justify the seizure of the article; but in reality the only change (material to these cases) which the order purported to make was in the nature of alteration of practice as to evidence—namely, by adding certain presumptions to those contained in article 34 of the declaration of London; and all these presumptions, whether set up in the interest of the captor or against him, are rebuttable (see M. Renault's report on the declaration). The order had proclaimed to the neutral owners of the cargoes

before the voyages commenced how in practice as matter of evidence and proof cargoes seized would be dealt with, and it might fairly be argued that they could not complain if their cases were treated in accordance with the order; but it is not necessary for me to pronounce any decision upon the point. I will, for the purpose of this case, assume that the order of August 20 had ceased to have any effect upon the promulgation of the subsequent order. The result is that cases relating to the *A. Nobel*, *B. Bjornson*, and the *Fridland* must be decided in accordance with the rules of international law.

The order of October 29 applies, however, to all the cargoes on the *Kim*.

As to the contention that the order is not binding on this court, I expressed my views on the general question of the binding character of orders in council upon the prize court in the case of the *Zamora*.[43] I do not wish to detract anything from what I then said; nor do I deem it necessary at present to add anything as to the general principles; but as to this order, so far as it affects questions arising in these proceedings, it is right to point out that no provision in it can possibly be said to be in violation of any rule or principle of international law. It is true that in a matter of real substance it alters the proposed compromise incorporated in article 35 of the declaration of London, whereby, if the declaration had been ratified, the doctrine of continuous voyage would have been excluded for conditional contraband.

The provision in article 35 was described by Sir Robert Finlay (counsel for several of the claimants) as "an innovation in international law as hitherto recognized in the United States and by Great Britain and other States, introducing an innovation of the first importance by excluding the doctrine of continuous voyage in the case of conditional contraband."

**Continuous voyage and conditional contraband.**

What the order in council did, therefore, was to prevent the innovation. In this regard it therefore proceeded, not in violation of, but upon the basis of, the existing international law upon the subject.

It may be well to note, and to record, that at the London Conference which produced the declaration all the Allied Powers engaged in this war, and also the United States, had been in favor of continuing to apply

[43] June 21, 1915, 31 Times L. R., 513. Under appeal to the Judicial Committee of the Privy Council.

the doctrine of continuous voyage or continuous transportation to conditional as well as to absolute contraband, a doctrine which, as we have seen, was nurtured and specially favored by the courts of the United States.

As to the modifications regarding presumptions and onus of proof, as, for instance, where goods are consigned "to order" without naming a consignee, these are matters really affecting rules of evidence and methods of proof in this court, and I fail to see how it is possible to contend that they are violations of any rule of international law.

The effect of the order in council is that, in addition to the presumptions laid down in article 34 of the "Declaration of London," a presumption of enemy destination as defined by article 33 shall be presumed to exist if the goods are consigned to or for an agent of the enemy State, or to a person in the enemy territory, or if they are consigned "to order," or if the ship's papers do not show who the consignee is; but in the latter cases the owners may, if they are able, prove that the destination is innocent.

Burden of proof.

All the goods claimed by the shippers on the *Kim* were consigned to their own order, or to the order of their agents (which is the same thing), and not to any independent consignee; and they have all entirely failed to discharge the onus which lies upon them to prove that their destination was innocent.

There was some suggestion that liability to capture in the declaration of London and order in council did not mean liability to confiscation or condemnation. On reference to the various provisions as to absolute and conditional contraband, it is clear that it is used in that sense.

I am of opinion that under the order in council the goods claimed by all the shippers on the *Kim* were confiscable as lawful prize.

Prize under order in council.

I now proceed to consider the confiscability of the cargoes on all the four vessels, apart entirely from the operation of the order in council upon the *Kim* cargoes.

Having decided that the cargoes, though ostensibly destined for Copenhagen, were in realty destined for Germany, the question remains whether their real ultimate destination was for the use of the German Government or its naval or military forces.

Prize apart from order in council.

If the goods were destined for Germany, what are the facts and the law bearing upon the question whether

they had the further hostile destination for the German Government for military use?

In the first place, as has already been pointed out, they were goods adapted for such use; and further, in part, adapted for immediate warlike purposes in the sense that some of them could be employed for the production of explosives. They were destined, too, for some of the nearest German ports like Hamburg, Lubeck, and Stettin, where some of the forces were quartered, and whose connection with the operations of war has been stated. It is by no means necessary that the court should be able to fix the exact port; see the *Dolphin;*[44] the *Pearl;*[45] the *Peterhoff.*[46]

Regard must also be had to the state of things in Germany during this war in relation to the military forces, and to the civil population, and to the method described in evidence which was adopted by the Government in order to procure supplies for the forces.

The general situation was described by the British Foreign Secretary in his note to the American Government on February 10, 1915, as follows:

Distinction between civil and military use.

"The reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy Government disappears when the distinction between the civil population and the armed forces itself disappears. In any country in which there exists such a tremendous organization for war as now obtains in Germany, there is no clear division between those whom the Government is responsible for feeding and those whom it is not. Experience shows that the power to requisition will be used to the fullest extent in order to make sure that the wants of the military are supplied, and however much goods may be imported for civil use it is by the military that they will be consumed if military exigencies require it, especially now that the German Government have taken control of all the foodstuffs in the country." I am not saying that the last sentence is applicable to the circumstances of this case. * * *

"In the peculiar circumstances of the present struggle where the forces of the enemy comprise so large a proportion of the population, and where there is so little

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[44] Ante, p. 251. [45] (1866) 5 Wall. 574. [46] 5 Wall. 28. at p. 59.

evidence of shipments on private as distinguished from Government account, it is most reasonable that the burden of proof should rest upon claimants."

It was given in evidence that about 10,000,000 of men were either serving in the German Army, or dependent upon or under the control of the military authorities of the German Government, out of a population of between sixty-five and seventy millions of men, women, and children. Of the food required for the population, it would not be extravagant to estimate that at least one-fourth would be consumed by these 10,000,000 adults.

"Highly probable destination."

Apart altogether from the special adaptability of these cargoes for the armed forces, and the highly probable inference that they were destined for the forces, even assuming that they were indiscriminately distributed between the military and civilian population, a very large proportion would necessarily be used by the military forces.

So much as to the probable ultimate destination in fact of the cargoes.

Now as to the question of the proof of intention on the part of the shippers of the cargoes.

It was argued that the Crown as captors ought to show that there was an original intention by the shippers to supply the goods to the enemy Government or the armed forces at the inception of the voyage as one complete commercial transaction, evidenced by a contract of sale or something equivalent to it.

Proof of intention.

It is obvious from a consideration of the whole scheme of conduct of the shippers that if they had expressly arranged to consign the cargoes to the German Government for the armed forces, this would have been done in such a way as to make it as difficult as possible for belligerents to detect it.

If the captors had to prove such an arrangement affirmatively and absolutely, in order to justify capture and condemnation, the rights of belligerents to stop articles of conditional contraband from reaching the hostile destination would become nugatory.

It is not a crime to dispatch contraband to belligerents. It can be quite legitimately sent subject to the risk of capture; but the argument proceeded as if it were essential for the captors to prove the intention as strictly as would be necessary in a criminal trial; and as if all the shippers need do was to be silent, to offer no explanation, and to

adopt the attitude toward the Crown, "Prove our hostile intention if you can."

In the first place, it may be observed that it is not necessary that an intention at the commencement of the voyage should be established by the captors either absolutely or by inference.

In the *Bermuda* [47] the Chief Justice of the Supreme Court of the United States, in referring to the decision of Sir William Grant in the *William* [48], said:

"If there be an intention, either formed at the time of the original shipment, or afterwards, to send the goods forward to an unlawful destination, the continuity of the voyage will not be broken, as to the cargo, by any transactions at the intermediate port."

Inference as to destination.

It is, no doubt, incumbent upon the captors in the first instance to prove facts from which a reasonable inference of hostile destination can be drawn, subject to rebuttal by the claimants.

Lord Granville as foreign secretary in 1885, in a note to M. Waddington (the French ambassador) which had reference to the question of rice being declared contraband by the French Government in relation to China, said:

"There must be circumstances relative to any particular cargo, or its destination, to displace the presumption that articles of food are intended for the ordinary use of life, and to show, prima facie at all events, that they are destined for military use, before they could be treated as contraband."

And Lord Lansdowne as foreign secretary in 1904, in a note to the British ambassador at St. Petersburg, stated the British view thus:

"The true test appears to be whether there are circumstances relating to any particular cargo to show that it is destined for military or naval use."

These statements, so qualified, it will be noted, were made when this country was making representations against the action of foreign Governments concerning conditional contraband. Therefore they were put as high, I assume, as it was thought they properly could be put.

So far as it is necessary to establish intention on the part of the shippers, it appears to me to be beyond ques-

[47] 3 Wall. 514.

[48] 5 C. Rob. 385.

tion that it can be shown by inferences from surrounding circumstances relating to the shipment of and dealings with the goods.

Cargoes are inanimate things, and they must be sent on their way by persons. If that is all that was meant by counsel for the claimants, when they argued that "intention" must be proved, their contention may be conceded. But it need not be an "intention" proved strictly to have existed at the beginning of the voyage or as an obligation under a definite commercial bargain.

If at the time of the seizure the goods were in fact on their way to the enemy Government or its forces as their real ultimate destination, by the action of the shippers, whenever the project was conceived, or however it was to be carried out; if, in truth, it is reasonably certain that the shippers must have known that that was the real ultimate destination of the goods (apart of course from any genuine sale to be made at some intermediate place), the belligerent had a right to stop the goods on their way and to seize them as confiscable goods.

In the circumstances of these cases, especially in view of the opportunity given to the claimants, who possess the best and fullest knowledge of the facts, to answer the cases made against them, any fair tribunal, like a jury, or an arbitrator, whose duty it was to judge facts, not only might but almost certainly would come to the conclusion that at the time of the seizure the goods which remained the property of the shippers were, if not as to the whole, at any rate as to a substantial proportion of them at the time of seizure on their way to the enemy for its hostile uses. The facts in these cases, in my opinion, more than amply satisfy the "highly probable destination" spoken of by Lord Stowell.

Before I conclude I will make reference to an opinion expressed, toward the end of last year, by a body of men eminent as students and expositors of international law in America, in the editorial comment in the American Journal of International Law, to which my attention was called by the law officers. Amongst them I need only name Mr. Chandler Anderson, Mr. Robert Lansing, Mr. John Bassett Moore, Mr. Theodore Woolsey, and Mr. James Brown Scott.

It is as follows:

"In a war in which the nation is in arms, where every able-bodied man is under arms and is performing military

duty, and where the noncombatant population is organized so as to support the soldiers in the field, it seems likely that belligerents will be inclined to consider destination to the enemy country as sufficient, even in the case of conditional contraband, especially if the Government of the enemy possesses and exercises the right of confiscating or appropriating to naval or military uses the property of its citizens or subjects of service to the armies in the field."

I cite this, not of course as any authority, but as showing how these eminent American jurists acknowledged that international law must have regard to the actual circumstances of the times.

I have not in this judgment followed the course thus indicated by them as a likely and reasonable one in the present state of affairs. I have preferred to proceed on the lines of the old recognized authorities.

I wish also to note the opinion recently expressed by the Hamburg prize court in the case of the *Maria*, decided in April last, where goods consigned from the United States to Irish ports were laden upon a Dutch vessel.

German case.

I refer to it, not because I look upon it as profitable or helpful (on the contrary, I agree with Sir R. Finlay that it should rather be regarded as "a shocking example"), but because it is not uninteresting as an example of the ease with which a prize court in Germany "hacks its way through" bona fide commercial transactions when dealing with foodstuffs carried by neutral vessels.

Be it remembered, too, that the court was dealing with wheat which was shipped from America before the war, and which had also before the war been sold in the ordinary course of business to well-known British merchants, R. & H. Hall (Ltd.).

This is what the Hamburg court said:

"There is no means of ascertaining with the least certainty what use the wheat would have been put to at the arrival of the vessel in Belfast, and whether the British Government would not have come upon the scene as purchaser, even at a very high price, and in this connection it must also be borne in mind that the bills of lading were made out to order, which greatly facilitated the free disposal of the cargo. That at the time of the conclusion of the contract concerning the acquisition of

the wheat on the part of R. & H. Hall (Ltd.), the possibility of using the same for war purposes had, perhaps, not been contemplated does not affect the question what actual use would have been made of the cargo of wheat after the outbreak of war in October, 1914."

For the many reasons which I have given in the course of this judgment and which do not require recapitulation, or even summary, I have come to the clear conclusion from the facts proved, and the reasonable and, indeed, irresistible inferences from them, that the cargoes claimed by the shippers as belonging to them at the time of seizure were not on their way to Denmark to be incorporated into the common stock of that country by consumption, or bona fide sale, or otherwise; but, on the contrary, that they were on their way not only to German territory, but also to the German Government and their forces for naval and military use as their real ultimate destination.

Conclusion from facts and inferences.

To hold the contrary would be to allow one's eyes to be filled by the dust of theories and technicalities, and to be blinded to the realities of the case.

Even if this conclusion were only accurate as to a substantial proportion of the goods, the whole would be affected, because—

"Contraband articles are said to be of an infectious nature, and they contaminate the whole cargo belonging to the same owners. The innocence of any particular article is not usually admitted to exempt it from the general confiscation." (Kent's Commentaries, 12th ed., by Holmes, J., p. 142.) (See to the same effect the *Springbok*[49] and the *Peterhoff*[50]).

The declaration of London (art. 42) is to the same effect; and M. Renault's report on it is:

"The owner of the contraband is punished in the first place by the condemnation of his contraband property, and in the second by that of the goods, even if innocent, which he may possess on board the same vessel."

It only remains, to conclude these long and troublesome cases, to state the results as applied to each of the claims:

I disallow the claims of Morris & Co., Armour & Co., Hammond & Co. (with Swift & Co.), Sulzberger & Sons Co., Pay & Co., Brödr Levy, Elwarth, Buch & Co., Hansen,

Decision.

[49] (1863) Blatch. Pr. Cas. 434, at p. 451.

[50] (1866) 5 Wall. 28, at p. 59.

Pedersen, Henriques and Zoydner, Korsor Fabrik, Dania Fabrik, Valeur, Baird, and Marcus & Co., and pronounce condemnation as prize of the goods comprised in them or of their proceeds, if sold.

I allow the claims of Cudahy & Co., the Provision Import Co., Christensen & Thoegersen, Segelcke, Frigast Bunchs Fed., Loehr, and Ullman & Co., and order the goods comprised in them or the net proceeds thereof, if sold, to be released to the respective claimants.

Stay pending appeal within six weeks in respect of claims disallowed. Costs to be secured to the extent of 5,000l. to be allocated between the various appellants. The cases of the ships themselves to stand over.

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## "HEINA"

*vapeur norvégien capturé en mer le 13 septembre 1914 par le croiseur Condé.*[51]

### CONSEIL DES PRISES.

Décision du 29 septembre 1915.

AU NOM DU PEUPLE FRANÇAIS,

Le Conseil des Prises a rendu la décision suivante, entre:

D'une part, le sieur Th. Olsen, en sa qualité de capitaine du vapeur norvégien *Heina* du port de Bergen (Norvège), capturé, le 13 septembre 1914, par le croiseur de la République *Condé* et conduit à Fort-de-France, et la société norvégienne par actions "J. Ludwig Mowinckel Dampskibsselskap," dont le siège est à Bergen, propriétaire dudit navire et représentée par le sieur J. Ludwig Mowinckel;

D'autre part, le Ministre de la Marine agissant au nom et pour le compte des capteurs et de la Caisse des Invalides de la Marine;

Documents.

Vu la lettre du Ministre de la Marine, en date à Paris du 3 mars 1915, enregistrée au secrétariat du Conseil des Prises, le 15 mars 1915, faisant envoi du dossier de l'instruction concernant la capture, pour transport de contrebande de guerre et assistance hostile, du vapeur norvégien *Heina* par le crosieur *Condé*, le 13 septembre 1914, et demandant que la validité de ladite capture soit prononcée;

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[51] Décision insérée dans le Journal officiel du 7 novembre 1915.

Vu la lettre du Ministre de la Marine, en date du 28 mars 1915, avisant le Conseil que l'armateur a été autorisé à reprendre la disposition de son navire moyennant le dépôt, à la Caisse des Invalides de la Marine de la somme de 675,000 francs, tous droits réservés:

Vu les pièces et documents composant le dossier, et notamment:

1° Le procès-verbal de capture dressé le 13 septembre 1914, ensemble l'inventaire des papiers de bord, l'inventaire du navire, celui du chargement et celui des effets et articles appartenant au capitaine et à l'équipage;

2° Les pièces de bord saisies à bord du *Heina*, lors de la capture, spécialement le manifeste de chargement, le rôle d'équipage et la patente de santé délivrée par le consul d'Allemagne, à la Guayra, le 10 septembre 1914;

3° Le journal de bord, la charte-partie du 8 octobre 1913 et la correspondance commerciale remise aux autorités maritimes françaises, à Fort-de-France, le 16 septembre 1914;

4° La note du commandant du *Condé* au Gouverneur de la Martinique, en date du 15 septembre 1914;

5° La protestation du capitaine du *Heina* en date, à Fort-de-France, du 16 septembre 1914;

6° Les rapports du chef de Service des Prises à Fort-de-France, en date des 19 et 30 septembre 1914;

7° Les procès-verbaux d'interrogatoire du capitaine et des principaux de l'équipage en date, à Fort-de-France, des 18, 22 et 24 septembre 1914;

8° La lettre du Ministre de France au Vénézuéla en date du 28 septembre 1914;

9° Le rapport du commandant du *Condé* en date du 22 janvier 1915;

10° Le rapport supplémentaire du commandant du *Condé*, du 10 juillet 1915, enregistré au secrétariat du Conseil des Prises, le 10 août 1915; ensemble le graphique, l'extrait de signaux et les journaux joints;

11° La lettre du Ministre des colonies, du 27 avril 1915, enregistrée le 3 mai 1915;

Vu l'avis inséré au Journal officiel du 16 mars 1915, ensemble l'avis donné au propriétaire du *Heina;*

Vu le mémoire présenté par Me Morillot, avocat au Conseil d'État, au nom de J. Ludwig Mowinckel, ledit mémoire enregistré au secrétariat du Conseil des Prises, le 22 avril 1915 et concluant à voir déclarer non valable, à raison du lieu de sa capture, la prise du vapeur *Heina;*

dire que la caution de 675,000 francs, versée par l'exposant pour la mise en liberté du vapeur, sera restituée à l'exposant avec intérêts du jour du versement au jour du remboursement de ladite caution; subsidiairement ordonner la restitution de la caution dont il s'agit à raison de la bonne foi de l'exposant; plus subsidiairement encore déclarer à toutes fins utiles que l'exposant a été dans l'ignorance du transport illicite qui a motivé la saisie; ensemble les pièces jointes ou textuellement citées audit mémoire, et spécialement la lettre du capitaine Th. Olsen, en date, à Fort-de-France, du 18 septembre 1914, et l'affidavit de J. L. Mowinckel, en date, à New-York, du 16 octobre 1914;

Vu les observations complémentaires audit mémoire enregistrées au secrétariat du Conseil des Prises, le 23 septembre 1915;

Vu les conclusions du commissaire du Gouvernement tendant à ce qu'il plaise au Conseil décider:

1° Après avoir reconnu à M. Mowinckel qualité pour soutenir que la capture du vapeur *Heina* aurait été effectuée dans les eaux territoriales danoises, que la capture de ce navire et de sa cargaison est non valable comme ayant été effectuées dans lesdites eaux territoriales;

2° Que l'État soit condamné à rembourser la somme de 675,000 francs versés par M. Mowinckel pour obtenir la restitution provisoire du bâtiment et à rendre la cargaison à ceux qui justifieront y avoir droit, mais en retenant, dans les deux cas, les sommes représentant les frais et le montant des dépenses qu'a entraînées la capture;

3° Que la demande de M. Mowinckel à fin d'allocation des intérêts de la somme versée par lui soit rejetée;

Vu les arrêtés du 6 germinal an VIII et du 2 prairial an XI;

Vu les décrets des 9 mai 1859 et 28 novembre 1861;

Vu le décret du 2 décembre 1910, qui a promulgué la Convention XIII de La Haye du 18 octobre 1907 concernant les droits et devoirs des puissances neutres en cas de guerre maritime;

Vu le décret du 25 août 1914 déclarant applicable, au cours de la présente guerre, la déclaration signée à Londres le 26 février 1909:

Ouï M. Rouchon-Mazerat, membre du Conseil, en son rapport, et M. Chardenet, commissaire du Gouvernement, en ses observations à l'appui de ses conclusions;

Le Conseil, après en avoir délibéré,

En ce qui touche la validité de la capture:

Statement of the case.

Considérant qu'à la date du 13 septembre 1914, et suivant procès-verbal en date dudit jour, le vapeur norvégien *Heina* a été capturé pour transport de contrebande de guerre et assistance hostile, par le croiseur de la République *Condé*, au large de l'île danoise de Saint-Thomas (Antilles);

Considérant que, par décision du Ministre de la Marine, portée à la connaissance du Conseil par lettre du 28 mars 1915, le propriétaire du navire capturé a été autorisé à déposer à la Caisse des Invalides de la Marine une somme de francs: 675,000 en représentation de la valeur dudit navire, lequel a été remis dès lors à sa disposition, tous droits réservés;

Considérant qu'il appert, tant des pièces saisies à bord que des documents versés aux débats, et notamment des déclarations du propriétaire du navire et du capitaine êux-mêmes, que le vapeur *Heina*, par suite de divers affrètements successifs, voyageait, le 13 septembre 1914, en exécution d'une charte-partie passée le 4 août 1914, au profit de la Compagnie allemande "Hamburg-Amerika Linie" et se livrait, contrairement à la neutralité, à des opérations ayant pour objet le ravitaillement en combustible et en vivres, sous le contrôle d'un agent allemand spécialement embarqué à cet effet, des forces navales allemandes aux Antilles et dans l'Atlantique;

Que ces faits sont de nature à justifier la capture et à entraîner la condamnation du navire et de son chargement pour assistance hostile, conformément aux principes consacrés dans les articles 37 et 46 de la Déclaration de Londres du 26 février 1909;

Considérant que, sans contester les faits qui ont motivé la capture, le propriétaire du navire oppose une exception tirée du lieu où celle-ci a été effectuée et conclut de ce chef à ce que ladite capture soit déclarée nulle comme ayant été faite en violation des eaux territoriales danoises;

Hague convention XIII.

Considérant qu'aux termes de l'article 2 de la Convention XIII de La Haye du 18 octobre 1907:

"Tous actes d'hostilité, y compris la capture et l'exercice du droit de visite, commis par des vaisseaux de guerre belligérants dans les eaux territoriales d'une

puissance neutre, constituent une violation de neutralité et sont strictement interdits,"—que ladite Convention, dûment ratifiée par les Gouvernements de France, de Norvège et de Danemark, a été promulguée par décret en date du 2 décembre 1910,—et que les instructions du Ministre de la Marine sur l'application du droit international en cas de guerre, en date du 19 décembre 1912, comportent les dispositions suivantes:

"Vous vous conformerez strictement aux interdictions imposées aux belligérants par la Convention XIII de La Haye, du 18 octobre 1907, concernant les droits et les devoirs des puissances neutres en cas de guerre maritime.

"Pour l'application de cette Convention, vous considérerez les eaux territoriales comme ne s'étendant jamais à moins de trois milles des côtes, des îles ou des bancs découvrant qui en dépendent, à compter de la laisse de basse mer, et jamais au delà de la portée du canon.

"Vous trouverez dans l'annexe 11 le tableau des puissances qui . . . ont fixé la limite de leurs eaux territoriales, quant au droit de guerre, à une distance de la côte supérieure à trois milles.".

Considérant que si, en matière de police de la pêche, le Danemark s'est départi de ses règles traditionnelles et a admis, pour ses eaux territoriales, la limite de 3 milles, en matière de prises la limite de 4 milles marins est restée en vigueur, ce que constate expressément l'annexe précitée;

Mais considérant que le *Condé* était, depuis le 30 août, en croisière, à 5 à 6 milles au large de Saint-Thomas, y bloquant trois navires de la "Hamburg Amerika Linie" et y attendant le vapeur *Heina*, qui avait été signalé comme se dirigeant vers cette île avec un chargement destiné au ravitaillement des croiseurs allemands;

Que, le 13 septembre, vers onze heures, il aperçut le *Heina* et que, ce navire ne stoppant pas après le coup de canon de semonce, il força de vitesse pour lui couper la route;

Qu'en ce qui concerne les degrés de latitude et de longitude dont la détermination est nécessaire pour situer le bâtiment capteur et le navire capturé, les indications fournies par le procès-verbal de capture, par l'état des signaux, par la lettre du capitaine du *Heina*, par le rapport

du commandant du *Condé*, sont toutes différentes,—et qu'il y a lieu de tenir, pour le plus approximativement exactes, celles de ce dernier rapport, en date du 22 janvier 1915, confirmées par celui du 10 juillet 1915, aux termes duquel "le point exact de capture est bien en dehors des eaux territoriales, par latitude 18°19′ Nord et longitude 67°30′ Ouest";

Que ce point se rapporte à la position du vapeur *Heina*, qui se trouvait ainsi à une distance de 4 milles 5/6 de la pointe sud de l'île de Savana, ce qui a permis au commandant du *Condé* d'écrire, le 15 septembre 1914, au Gouverneur de la Martinique:

"Bien qu'il (le *Heina*) eût tenté de gagner Saint-Thomas par l'ouest, j'ai pu l'arrêter avant qu'il n'entrât dans les eaux territoriales"; Territorial waters.

Que les seuls relèvements qui ont servi à déterminer la position du *Condé*: Pointe de Savana N. 72 E. et roche du Brigantin S. 54 E. ne permettent certainement pas, étant donné l'approximation du compas de relèvement et la distance des points relevés, d'apprécier la distance réelle à un sixième de mille près, c'est-à-dire à deux longueurs du bâtiment, et qu'ainsi il n'est nullement démontré que ce croiseur ne se trouvait pas à 4 milles au large, comme l'estimait le commandant;

Considérant, par ailleurs, que dans la protestation qu'il a remise au moment de la capture, le capitaine du *Heina* n'a présenté aucune observation relative au point où cette capture a été opérée;

En ce qui touche les conclusions subsidiaires de M. Mowinckel:

Considérant qu'il résulte des pièces jointes au dossier et notamment de l'affidavit reçu le 16 octobre 1914 à New-York, que la Société norvégienne par actions "J. Ludwig Mowinckel Dampskibsselskap," propriétaire du vapeur *Heina* et représentée par M. J. Ludwig Mowinckel, a frété ledit navire, suivant charte-partie du 8 octobre 1913, à la "New-York and Bermudez Co." de Philadelphie, avec faculté de sous-location aux risques et périls des affréteurs;—que cette Compagnie a, le 14 juillet 1914, sous-frété le vapeur *Heina* à la "New-York and Puerto Rico Steamship Co.", laquelle a elle-même sous-frété le vapeur, le 4 août 1914, à la Compagnie allemande "Hamburg Amerika Linie";—que M. J. L. Mowinckel

n'a pas connu ces sous-affrètements successifs, auxquels il n'avait d'ailleurs pas le pouvoir de s'opposer, et qu'il était en droit de compter que, suivant les clauses de la charte-partie initiale, le navire ne devait être affecté "qu'au transport de marchandises licites";

Mais considérant que la validité de la capture de navire étant reconnue, comme il a été dit ci-dessus, l'État ne saurait être condamné à restituer à M. Mowinckel la somme versée par lui pour reprendre la libre disposition dudit navire;—qu'il ne peut être fait droit qu'aux conclusions tendant à ce qu'il soit donné acte de ce que M. Mowinckel a été dans l'ignorance du transport illicite qui a motivé la saisie,

Decision. DÉCIDE:

La prise du vapeur *Heina* et de sa cargaison est déclarée bonne et valable pour la valeur en être attribuée aux ayants droit conformément aux lois et règlements;

Tous effets, argent, instruments nautiques et autres objets personnels appartenant au capitaine et à l'équipage ont été à bon droit laissés à la disposition des ayants droit;

Il est donné acte à M. J. Ludwig Mowinckel, représentant de la Société "J. Ludwig Mowinckel Dampskibsselskap"; propriétaire du vapeur *Heina*, de sa demande tendant à ce qu'il soit déclaré, à toutes fins utiles, que l'exposant a été dans l'ignorance du transport illicite qui a motivé la saisie dudit vapeur et de sa cargaison.

Le surplus des conclusions de M. J. Ludwig Mowinckel est rejeté.

Délibéré à Paris, dans la séance du 29 septembre 1915, où siégeaient: MM. Mayniel, président; René Worms, Rouchon-Mazerat, Gauthier, Fuzier, Fromageot et de Ramey de Sugny, membres du Conseil, en présence de M. Chardenet, commissaire du Gouvernement.

En foi de quoi la présente décision a été signée par le président, le rapporteur et le secrétaire-greffier.

Signé à la minute:

E. MAYNIEL, *président;*
ROUCHON-MAZERAT, *rapporteur;*
G. RAAB D'OÉRRY, *secrétaire-greffier.*

Pour expédition conforme:

Le Secrétaire-greffier,
G. RAAB D'OËRRY.

Vu par nous, Commissaire du Gouvernement,
P. CHARDENET.

## "CHEREF"

*caïqué turc capturé en mer le 12 mai 1915 par le croiseur cuirassé Jeanne-d'Arc* [52]

### CONSEIL DES PRISES.

Décision du 29 novembre 1915.

AU NOM DU PEUPLE FRANÇAIS,

Le Conseil des Prises a rendu la décision suivante, entre:

D'une part, les capitaine, propriétaires, chargeurs et destinataires de la cargaison du caïque *Cheref* arrêté en mer, par 28° 17′ de longitude Est et 36° 36′ de latitude Nord, à la date du 12 mai 1915, à 8 h. 30, par le croiseur cuirassé français *Jeanne-d'Arc*;

Et, d'autre part, le Ministre de la Marine, agissant pour le compte des capteurs et de la Caisse des Invalides de la Marine;

Documents.

Vu la lettre du Ministre de la Marine, en date du 16 septembre 1915, enregistrée au Secrétariat du Conseil des Prises, sous le n° 60, le 2 octobre suivant, faisant envoi du dossier de l'instruction concernant la saisie de ce voilier et de sa cargaison, et demandant que cette saisie soit déclarée bonne et valable;

Vu les pièces composant ledit dossier, et notamment:

1° Le procès-verbal de saisie et l'inventaire dressé le 12 mai par l'enseigne de vaisseau Robert, envoyé à bord du *Cheref* par le commandant de la *Jeanne-d'Arc;*

2° La patente de santé délivrée par l'office sanitaire d'Adalia et faisant connaître que le caïque bat pavillon ottoman;

3° Un passeport à l'intérieur;

4° Un manifeste;

5° Le procès-verbal dressé le 12 mai par le capitaine de vaisseau Grasset, commandant la *Jeanne-d'Arc,* et faisant connaître les raisons pour lesquelles la prise a dû être détruite;

Vu l'avis inséré au Journal officiel du 4 octobre 1915, invitant les intéressés à fournir leurs observations dans le délai d'un mois, l'affaire devant être jugée avant le 3 décembre 1915;

Vu les conclusions du commissaire du Gouvernement tendant à ce qu'il plaise au Conseil déclarer valable la capture du caïque *Cheref* et de sa cargaison, attribuer aux ayants droit, conformément aux lois et règlements, la somme représentant la valeur de la cargaison saisie;

[52] Décision insérée dans le Journal officiel du 9 janvier 1916.

dire qu'il n'y a pas lieu à attribution pour la valeur du navire saisi, dont la destruction a été opérée pour des motifs de force majeure dûment établis;

Vu les arrêtés des 6 germinal an VIII et 2 prairial an XI;

Vu les décrets des 9 mai 1859 et 28 novembre 1861;

Vu la déclaration du Congrès de Paris, en date du 16 avril 1856;

Vu le décret du 6 novembre 1914 rendant applicable, sous certaines réserves, la déclaration de la Conférence navale de Londres du 26 février 1909, ensemble ladite declaration;

Ouï M. Fuzier, membre du Conseil, en son rapport, et M. Chardenet, commissaire du Gouvernement, en ses observations à l'appui des conclusions ci-dessus visées;

Le Conseil, après en avoir délibéré,

Declaration of London.

Considérant, d'une part, qu'il résulte des pièces du dossier et qu'il n'est pas contesté que le caïque *Cheref* était de nationalité ottomane; qu'au moment où il a été saisi l'état de guerre existait de fait entre la France et la Turquie, depuis le 29 octobre 1914, à 3 heures du matin, date du bombardement par les Turcs du port d'Odessa, où se trouvait un navire français qui a été canonné et à bord duquel ont été tués deux nationaux français; qu'ainsi la cargaison de ce caïque doit être présumée ennemie, aux termes de l'article 59 de la Déclaration de Londres, et qu'il n'est apporté aucune preuve ni même aucune allégation contraire; que, dès lors, les denrées composant cette cargaison constituaient des marchandises ennemies naviguant sous pavillon ennemi et n'étaient pas de celles qui, en vertu de la déclaration du Congrès de Paris, en date du 16 avril 1856, ont cessé d'être saisissables;

Considérant, d'autre part, qu'il est établi, par le procès-verbal sus-visé du commandant du croiseur *Jeanne-d'Arc*, qu'il était impossible de remorquer ce voilier, vieux et mal défendu contre la mer, jusqu'au port allié le plus proche qui se trouvait à plus de 120 milles; qu'ainsi le bâtiment capteur, après avoir pris la cargaison à son bord, a pu valablement détruire le caïque dont l'équipage avait fui à terre à l'approche du croiseur,

Decision.

DÈCIDE:

1° Est déclarée bonne et valable la saisie du caïque turc *Cheref* et de sa cargaison;

2° Le voilier ayant été détruit pour les motifs ci-dessus indiqués, il n'y a lieu d'en attribuer la valeur;

3° La somme représentant la valeur de 10 tonnes d'orge, de 50 bidons d'huile et de beurre et de 11 sacs de farine remis par le capteur au consul de France à Alexandrie, sera attribuée aux ayants droit, conformément aux lois et règlements en vigueur.

Délibéré à Paris, dans la séance du 29 novembre 1915, où siégeaient: MM. Mayniel, président, René Worms, Fuzier, Fromageot et de Ramey de Sugny, membres du Conseil, en présence de M. Chardenet, commissaire du Gouvernement.

En foi de quoi, la présente décision a été signée par le Président, le Rapporteur et le Secrétaire-greffier.

Signé à la minute:

E. Mayniel, *président;*
Fuzier, *rapporteur;*
G. Raab d'Oërry, *secrétaire-greffier.*

Pour expédition conforme:
Le Secrétaire-greffier,
G. Raab d'Oërry.

Vu par nous, Commissaire du Gouvernement,
P. Chardenet.

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## THE "INDIAN PRINCE."

February 17, 1916.

I Entscheidungen des Oberprisengerichts, 87.

In the prize matter concerning the English steamer *Indian Prince*, Newcastle her home port, the imperial superior prize court in Berlin, in virtue of the proceedings of its sitting of February 17, 1916, has found as follows:

Decision.

"The appeals from the decision of the Prize Court in Hamburg, July 3, 1915, are refused."

### REASONS.

Statement of the case.

On September 4, 1914, the English steamer *Indian Prince*, with sundry merchandise on board, and on the way from Santos by way of Trinidad, to ports of the United States of North America, at 7° south and 31° west, was brought to by a German war vessel, and, in view of the fact that the taking of the prize to port was impossible, was sunk on September 9, after passengers and crew had left the ship. The steamer was the property of the Prince Line (Ltd.), Newcastle.

Upon the announcement on the part of the imperial prize court in Hamburg, 30 parties interested in the cargo presented claims for compensation for damages for 37 shipments that were destroyed.

Compensation for damage to neutral merchandise.

The court has confined the matter to the sole question as to whether or not compensation for damages for neutral merchandise that was on board an enemy ship and sunk along with the latter must be made, and has found as follows:

"Both the ship and the cargo that were sunk were subject to seizure. The claims from 1 to 10, from 12 to 36, and 38 are refused as being unfounded."

The plaintiffs have appealed from the decision of the prize court as regards Nos. 2 to 10, 12 to 26, and 38.

The appeal had to be refused.

In the prize matter of the *Glitra* the competent court has decided that when an enemy prize is lawfully destroyed, neutral merchandise found on board such enemy ship and destroyed along with her is not entitled to claim compensation for damages. This decision is to be followed with regard to the contrary assertions made in the present case.

German prize regulations.

From generally accepted principles, no such right can be deduced, because the act through which the cargo was ruined is not unlawful, but is, on the contrary, lawful. Nor has a right been established to compensation for damages by any positive provision of the prize regulations. This applies also to article 110 of the prize regulations together with article 8 of the same, to which the plaintiffs have referred. For however correct in itself the conclusion may be, if the captain is not authorized even to take neutral merchandise from an enemy ship in order to make use of it, he may by no means do so in order to destroy it without using it, this fact is in itself no help in the consideration of the question with which we are dealing. The question we are here considering is as to whether or

Lawful destruction.

not, in accordance with international law, the commander is obligated to refrain from the lawful destruction of an enemy ship merely for the purpose of not destroying at the same time neutral merchandise on board such ship, and in particular, as to whether or not he is obligated thereto when it is impossible to take the ship to port. After having repeatedly considered the question, the competent court must hold to a denial of such obligation. In this connection one need only make reference to the pre-

vious statement of justification. In particular, it is not correct that the said decision was based upon the ground that the shippers, by lading their merchandise on an enemy ship, had assumed the risk of seizure and destruction and, therefore, were not entitled to compensation.[53]

On the contrary, in that decision, the idea that the neutral was free to expose or not to expose his merchandise on board the enemy ship and to the dangers connected therewith was considered only in a general way; and that for the purpose of showing that the refusal of an indemnification was not only obligatory from a purely legal point of view, but that it could not be regarded as unfair.

Cargo.

The essential reason for that decision, as well as for the decision in the present case is found in the actual dependence of the cargo on the fate of the ship by reason of which the cargo must bear the loss arising from the exercise of a prize measure which is justifiably taken with regard to the ship. It can not be seen why this generally accepted principle, which is also unreservedly accepted in the memoir to article 64 of the London declaration, should only apply in case of capture and not likewise in case of the justified destruction of a ship.

Declaration of London.

Treaty between Prussia and the United States, 1828.

The only question, therefore, that arises is as to whether or not the commercial treaty between Prussia and the United States of North America offers a basis for the claim of the plaintiffs. This also must be denied.

The provisions of the said treaty with Prussia must, in view of the practice which has been confirmed mutually not only during the present war, but likewise in previous instances, be considered as governing the relations existing between the German Empire and the United States; materially, however, nothing arises from the treaty in favor of the plaintiffs.

According to Article XII of the treaty of 1828 we are only to consider Articles XII and XIII of the earlier treaties of 1785 and 1799, and Article XII in the original text of the treaty of 1785.

"Free ship, free goods."

In this Article XII the legal principle "free ship, free goods" is agreed upon. Whereas in treaties which the United States concluded about the same time with other States there is found beside this provision the principle reading "enemy ship, enemy goods," whereby an ex-

[53] The plaintiffs have asserted that this viewpoint does not apply here, because the loading had taken place even before the outbreak of the war.

ception is made only for merchandise which was unloaded before the outbreak of the war or within a definite period after the outbreak, the treaty with Prussia is silent as regards this matter, and there might be doubt as to how we are to understand that fact. Prussia may, indeed, have taken the standpoint that neutral merchandise, even on board an enemy ship, should not be subject to seizure. This may, indeed, be presumed if for no other reason than that not long thereafter the same fundamental principle was recognized in the Prussian statute book. Furthermore, in the course of the negotiations that led to the treaty of 1785 Prussia had expressed the desire—whereto the plaintiffs appropriately refer—that instead of the expression proposed in the American outline, "enemy ship, enemy goods" there should be put the contrary idea, "enemy ship, free goods." But the United States did not accept the proposition, and therefore nothing has been stipulated in regard to this point. Thereby the legal condition as provided by the treaty corresponded to that which had been sought for by the "armed neutrality" of 1780. In the latter's text only the rule "free ship, free goods" found expression, while nothing was said therein with regard to neutral merchandise on board an enemy ship. From many sources, however, this has been interpreted to the effect that no resistance would be attempted against the seizure of neutral merchandise on board an enemy ship. "By long practice it had become the custom to regard the confiscation of neutral merchandise on board enemy ships as a concession made to the belligerent in order that the latter might recognize the inviolability of enemy merchandise on board neutral ships."

[Cauchy, Le Droit Maritime International, Vol. II, p. 262.]

Treaty of 1785.

Now, it is this standpoint which the official authorities of the United States of North America took when interpreting the treaty of 1785 at the time when it was still in force. No less a man than the Secretary of State, Jefferson, who had had a personal part in the conclusion of the treaty of 1785, expressed himself to that end when in 1793 France, who was then at war with England, made complaint to the United States to the effect that England was seizing French merchandise carried in American ships, and that the United States did not make objection. In the note of Jefferson, dated July 24, 1793, by which the complaint was refused as unfounded, because ac-

cording to the general law of nations (Consolato del mar) enemy merchandise on board a neutral ship was subject to seizure, which could be modified only in case "free ship, free goods" were agreed upon by treaty, we find these words:

Jefferson's note.

> We have adopted this modification in our treaties with France, the Netherlands and Prussia, and, therefore, as to them, our vessels carry the goods of their enemies, and *we lose our goods, when in the vessels of their enemies.*

Although in the treaty with Prussia only the principle "free ship, free goods" was established, yet the Secretary of State, Jefferson, assumes that in accordance therewith, *the principle "enemy ship, enemy goods"* applied automatically with regard to Prussia.

The claimants, therefore, do not appeal to Article XII either, but to Article XIII of the treaties of 1785 and 1799. They do not deny that even from this article nothing can be gained by them in favor of their standpoint in case the French text of the treaty is considered. But they want to hold to the English text which evidences a change from which they believe they can draw the conclusion that, in all cases where merchandise of nationals of the United States of America is concerned, even if the cargo is on board an enemy ship, indemnification must be paid.

We need not consider which of the two texts is the authoritative one, nor need we consider how, in case both are authoritative, a contradiction between the two might be cleared up. For, not even the English text yields any results favorable to the plaintiffs. Their view is, in the first place, controverted because it is in direct contradiction with the interpretation which the Government of the United States, as has already been shown, gave to it in 1793.

Texts of treaty.

Furthermore, even from a purely linguistic point of view, the interpretation of the English text as given by the plaintiffs, is not admissible. While the French text deals with merchandise that is laden:

"À bord des vaisseaux des sujets ou citoyens de l'une des Parties,"

we read, on the contrary, in the English text, not as it should read in literal agreement: Carried in the vessels of the subjects or citizens of either party, but "Carried in the vessels *or by* the subjects or citizens of either party."

Thereby, according to the plaintiffs, there comes under the protection of Article XIII merchandise that is shipped in American or Prussian ships, as well as merchandise that is shipped by American or Prussian nationals—in no matter what kind of ships, and, hence, also in enemy ships,—which, so it is asserted, is equivalent to merchandise that *belongs to* such nationals.

Transportation.

But the latter idea finds no expression in the treaty. "Carried by" does not refer to property relationship, but to the personality of him who undertakes the *transportation*. That, however, is the ship-owner, and not the consignor or consignee. The entire departure of the English text from the French text, therefore, amounts to an extension of the English text, to the effect that besides the ships of both nationals there are expressly named, and that in the first place, the ships of the parties to the treaty themselves, that is to say, the public ships—"the vessels of either party." For the words "of either party" must also be applied to "in the vessels," if any meaning at all is to be given to the latter expression.

It is significant, that in the French text as found in Martens, Recueil des Traités, Supplement, II, page 226, which reprints the edition of the treaty prepared by the imperial office of the interior, and which, unmistakably, presents an independent translation from the English made soon after the conclusion of the treaty of 1799, the translator has reproduced the passage in exactly this sense. The expression "elles mêmes" in the form "ou d'elles mêmes" can, for grammatical reasons, refer only to the "parties contractantes" in whose own ships the merchandise is being conveyed.

But, from material grounds as well, another interpretation is not possible.

Contraband.

Article XIII deals with contraband. To meet the controversies that are usually connected with the question as to whether or not merchandise is contraband, agreement is made that even contraband shall not be subject to seizure; in case of need it may indeed be requisitioned upon payment of its value; if the military situation so demands, it may even be seized temporarily, but even so only by compensation made for the damage thereby accruing to the shipper. These provisions of Article XIII are most closely connected with that which is

agreed upon in Article XII. As, in a general way, contraband is always excepted from the principle "free ship, free goods" so in this case, after that principle is established in Article XII for enemy merchandise in Prussian or American ships, the exceptional case is taken up in Article XIII when the merchandise on board those ships is of contraband nature or suspected of being contraband. That this is indeed meant is indicated by the provision regarding the treatment of the particular ship, by which the captain who undertakes to convey contraband to the enemy shall be free to surrender such contraband in order that he may thereafter continue his journey unmolested. Unmistakably in this connection only the ships of the contracting parties were under consideration. It seems absolutely out of the question that the matter agreed upon should also have been intended to cover the case of an enemy ship conveying weapons, ammunition, etc., to her own military forces. It can not have been the intention that the belligerent party which succeeds in capturing an enemy ship carrying weapons and ammunition, should be obligated to make compensation therefor in case it was a national of the other contracting State who caused the transportation of the weapons to the enemy, or that the enemy ship in case it has surrendered the contraband, might continue her trip unmolested.

Treaty of 1799.

Accordingly, if Article XIII of the treaty of 1799 does not refer to contraband on board enemy ships, it goes without saying that nothing can be deduced from it as regards the treatment of innocent merchandise on board such ships. The principle "enemy ship, free goods" is, now of course, also valid with regard to the United States, but its validity does not rest upon any special conventional provision, but only upon general international law as it has been recognized in the declaration of Paris of 1856 and as applicable, according to the German prize regulations, even to countries which, like the United States, have not adhered to that declaration. With regard, therefore, to the question whether in circumstances like those now under discussion, indemnification is to be made to the owners of neutral merchandise, only the same principles that apply to the nationals of other neutral countries can apply to the nationals of the United States. These principles have been recorded in the decision regarding the *Glitra*.

## THE "FEDERICO."

*vapeur espagnol capturé en mer le 10 octobre 1914 par le torpilleur 360.*[54]

CONSEIL DES PRISES.

Décision des 15 et 16 mars 1916.

AU NOM DU PEUPLE FRANÇAIS,

Le Conseil des Prises a rendu la décision suivante, entre:

D'une part, le propriétaire du vapeur espagnol *Federico*, de Barcelone, capturé en mer le 10 octobre 1914 par le torpilleur *360;*

Documents.

Et, d'autre part, le Ministre de la Marine, représentant les capteurs et la Caisse des Invalides de la marine;

Vu la lettre du Ministre de la Marine, enregistrée au secrétariat du Conseil des Prises le 18 janvier 1915, demandant qu'il soit statué sur la validité de la prise effectuée le 10 octobre 1914 par le torpilleur *360;*

Vu le procès-verbal de capture du vapeur *Federico*, dressé le 11 octobre 1914, en rade de Toulon;

Vu le procès-verbal de visite, dressé le 15 octobre 1914;

Vu le procès-verbal de capture, comme prisonniers de guerre, de passagers allemands et austro-hongrois, mobilisés et transportés par le vapeur *Federico*, ledit procès-verbal dressé le 19 octobre 1914;

Vu le procès-verbal d'interrogatoire de l'équipage, dressé le 11 octobre 1914 par le commissaire des torpilleurs de Toulon et le procès-verbal d'interrogatoire du capitaine du vapeur *Federico*, dressé le 20 octobre 1914 par le délégué du commissaire aux Prises de Toulon;

Vu l'avis inséré au Journal officiel le 21 janvier 1915, ensemble l'avis donné au propriétaire du vapeur *Federico;*

Vu le mémoire présenté par M. Henry Mornard, avocat au Conseil d'État, au nom du sieur Ricardo Ramos, propriétaire du vapeur *Federico*, ledit mémoire enregistré au secrétariat du Conseil des Prises le 20 février 1915 et tendant à la relaxe de ce vapeur, par les motifs que ses passagers n'étaient pas incorporés dans les armées ennemies, et qu'il ne voyageait pas spécialement en vue de leur transport; ensemble la lettre adressée par le sieur Ramos au consul général de France à Barcelone et transmise par celui-ci le 4 novembre 1914 au Ministère des Affaires étrangères;

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[54] Décision insérée dans le Journal officiel du 10 mai 1915. (Voir décret rendu en Conseil d'État p., 367.)

Vu le mémorandum adressé au Ministre des Affaires étrangères par l'ambassadeur d'Espagne à Paris, enregistré comme ci-dessus le 26 février 1915, et exposant notamment que c'est à tort que le vapeur *Federico* a été visité à Toulon au lieu de l'être en pleine mer;

Vu les conclusions du commissaire du Gouvernement tendant à ce qu'il plaise au Conseil déclarer bonne et valable la capture du vapeur *Federico*, pour la valeur nette en être adjugée aux ayants droit, conformément aux lois et règlements;

Ensemble les autres pièces jointes au dossier;

Vu l'arrêté du 2 prairial an XI;

Vu la déclaration du Congrès de Paris du 16 avril 1856;

Vu le décret du 25 août 1914, ensemble la déclaration de la conférence navale de Londres du 26 février 1909, que ledit décret rend applicable durant la guerre, sous réserve des additions et modifications qu'il détermine;

Vu les décrets des 9 mai 1859 et 28 novembre 1861;

Ouï M. René Worms, membre du Conseil, en son rapport, et M. Chardenet, commissaire du Gouvernement, en ses observations à l'appui de ses conclusions ci-dessus visées;

Le Conseil, après en avoir délibéré,

Sur la régularité de la capture:

Statement of the case.

Considérant qu'il résulte de l'instruction que le 10 octobre 1914, lors de la capture du vapeur espagnol *Federico* par le torpilleur *360*, l'état de la mer ne permettait pas à l'état-major du torpilleur de procéder au large à la visite du *Federico;* que, dans ces circonstances, la visite a pu régulièrement n'être effectuée qu'au port de Toulon, où le navire avait été conduit;

Sur la validité de la capture;

Declaration of London.

Considérant que la Conférence navale, tenue à Londres en 1909, a fait, le 26 février, une déclaration qui n'a pas été ratifiée par la France; mais que le décret ci-dessus visé du 25 août 1914 a rendu ladite déclaration applicable durant la guerre, sous réserve des additions et modifications qu'il a en même temps édictées; qu'ainsi les dispositions contenues tant dans la déclaration que dans le décret constituent, dans leur ensemble, un acte unilatéral du Gouvernement français, dont il appartient au Conseil des Prises, chargé d'en faire application, de déterminer le sens et la portée;

Considérant que, aux termes de l'article 45 de la Déclaration de Londres, un navire neutre est confisqué lorsqu'il

voyage spécialement en vue du transport de passagers individuels incorporés dans la force armée ennemie;

Considérant qu'il résulte de l'instruction que le vapeur *Federico* n'est pas un paquebot faisant régulièrement le transport des voyageurs; que, lorsqu'il a été capturé en mer, il voyageait spécialement en vue du transport, de Barcelone à Gênes, de nombreux passagers allemands et austro-hongrois, dont la grande majorité appartenaient par leur âge aux classes mobilisées par leurs gouvernements respectifs et voyageaient pour repondre à cet appel; que, dans ces circonstances, ces passagers devaient être regardés comme incorporés au sens de l'article 45 précité, et qu'ainsi le navire était, aux termes dudit article, passible de confiscation.

Decision. DECIDE:

La prise du vapeur espagnol *Federico*, y compris les agrès, apparaux et accessoires, est déclarée bonne et valable pour la valeur nette en être adjugée aux ayants droit, conformément aux lois et règlements en vigueur.

Délibéré à Paris, les 15 et 16 mars 1915, où siégeaient: MM. Mayniel, président; René Worms, Rouchon-Mazerat, Gauthier, Fuzier, Lefèvre et Fromageot, membres du Conseil, en présence de M. Chardenet, commissaire du Gouvernement.

En foi de quoi la présente décision a été signée par le Président, le Rapporteur et le Secrétaire-greffier.

Signé à la minute:

E. MAYNIEL, *président;*
RENE WORMS, *rapporteur;*
G. RAAB D'OËRRY, *secrétaire-greffier.*

Pour expédition conforme:

Le Secrétaire-greffier,
G. RAAB D'OËRRY.

Vu par nous, Commissaire du Gouvernement.

P. CHARDENET.

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## THE "ZAMORA."

[PRIVY COUNCIL.]

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

April 7, 1916.

[1916] 2 A. C. 77.

Statement of case. Lord Parker of Waddington, in delivering the considered judgment of the board, said that on April 8,

1915, the *Zamora* was stopped by one of his Majesty's cruisers and was taken to the Orkney Islands and thence to Barrow-in-Furness. She was seized as prize in the latter port on April 19, 1915, and in due course was placed in the custody of the marshal of the prize court. It was admitted on the one hand that the copper was contraband of war, and on the other hand that the steamship was ostensibly bound for a neutral port. On May 14, 1915, a writ was issued by His Majesty's procurator general claiming confiscation of both vessel and cargo, and on June 14, 1915, the president, at the instance of the procurator general, made an order under Order XXIX, rule 1, of the prize court rules, giving leave to the war department to requisition the copper, subject to an undertaking in accordance with the provisions of Order XXIX, rule 5. The present appeal was from the president's order.

It would be convenient first to consider the terms of Order XXIX. Though the order in terms applied to ships only, it was by virtue of Order I, rule 2, of the prize court rules equally applicable to goods. The first rule of Order XXIX provided that where it was made to appear to the judge on the application of the proper officer of the Crown that it was desired to requisition a ship in respect of which no final decree of condemnation had been made, he should order that the ship be appraised and on an undertaking's being given in accordance with rule 5 of the order the ship should be released and delivered to the Crown. The third rule of the order provided that where in any case of requisition under the order it was made to appear to the judge on behalf of the Crown that the ship was required for the service of his Majesty forthwith, the judge might order the vessel to be forthwith released and delivered to the Crown without appraisement. In such a case the amount payable by the Crown was to be fixed by the judge under rule 4 of the order.

The fifth rule of the order provided that in every case of requisition under the order an undertaking in writing should be filed by the proper officer of the Crown for payment into court on behalf of the Crown of the appraised value of the ship or of the amount fixed under rule 4 of the order as the case might be, at such time or times as the court should declare that the same or any part thereof was required for the purpose of payment out of court.

The first observation which their lordships desired to make on this order was that the provisions of rule 1 were prima facie imperative. The judge was to act in a certain way whenever it was made to appear to him that it was desired to requisition the vessel or goods on his Majesty's behalf. If that were the true construction of the rule, and the judge was, as a matter of law, bound thereby, there was nothing more to be said, and the appeal must fail. If, however, it appeared that the rule so construed was not, as a matter of law, binding on the judge, it would have, if possible, to be construed in some other way. Their lordships proposed, therefore, to consider in the first place whether the rule, if construed as an imperative direction to the judge, was to any and what extent binding.

The prize court rules derived their force from orders of his Majesty in council of April 29, 1915. These orders were expressed to be made under the powers vested in his Majesty by virtue of the prize court act, 1894, or otherwise. The act of 1894 conferred on the King in council power to make rules for the procedure and practice of the prize courts. So far, therefore, as the prize court rules related to procedure and practice, they had statutory force and were undoubtedly binding. But Order XXIX, rule 1, construed as an imperative direction to the judge, was not merely a rule of procedure or practice. It could only be a rule of procedure or practice if it were construed as prescribing the course to be followed if the judge was satisfied that according to the law administered in the prize court the Crown had, independently of the rule, a right to requisition the vessel or goods, or if the judge was minded in the exercise of some discretionary power inherent in the prize court to sell the vessel or goods to the Crown.

If, therefore, Order XXIX, rule 1, construed as an imperative direction, were binding, it must be by virtue of some power vested in the King in council, otherwise than by virtue of the act of 1894. It was contended by the attorney general that the King in council had such a power by virtue of the royal prerogative, and their lordships would proceed to consider this contention.

**Power of King in council.**

The idea that the King in council, or indeed any branch of the Executive, had power to prescribe or alter the law to be administered by courts of law in this country was not in harmony with the principles of our constitution.

It was true that, under a number of modern statutes, various branches of the Executive had power to make rules having the force of statutes, but all such rules derived their validity from the statute which created the power, and not from the executive body by which they were made. No one could contend that the prerogative involved any power to prescribe or alter the law administered in courts of common law or equity. It was, however, suggested that the manner in which prize courts in this country were appointed and the nature of their jurisdiction differentiated them in this respect from other courts.

Prize jurisdiction.

Before the naval prize act, 1864, jurisdiction in matters of prize was exercised by the High Court of Admiralty by virtue of a commission under the great seal at the beginning of each war. The commission, no doubt, owed its validity to the prerogative, but it could not on that account be properly inferred that the prerogative extended to prescribing or altering the law to be administered from time to time under the jurisdiction thereby conferred. The courts of common law and equity in like manner originated in an exercise of the prerogative. The form of commission conferring jurisdiction in prize on the court of admiralty was always substantially the same. Their lordships would take that quoted by Lord Mansfield in Lindo *v.* Rodney (2 Doug. 613) as an example. It required and authorized the court of admiralty "to proceed upon all and all manner of captures, seizures, prizes, and reprisals of all ships or goods that are or shall be taken, and to hear and determine according to the course of admiralty and the law of nations."

If those words were considered there appeared to be two points requiring notice, and each of them, so far from suggesting any reason why the prerogative should extend to prescribing or altering the law to be administered by a court of prize suggested strong grounds why it should not.

In the first place, all those matters on which the court was authorized to proceed were, or arose out of, acts done by the sovereign power in right of war. It followed that the King must, directly or indirectly, be a party to all proceedings in a court of prize. In such a court his position was in fact the same as in the ordinary courts of the realm on a petition of right which had been duly fiated. Rights based on sovereignty were waived

and the Crown accepted for most purposes the position of an ordinary litigant. A prize court must, of course, deal judicially with all questions which came before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

Municipal and international law.

In the second place, the law which the prize court was to administer was not the national, or, as it was sometimes called, the municipal law, but the law of nations—in other words, international law. It was worth while dwelling for a moment on that distinction. Of course, the prize court was a municipal court and its decrees and orders owed their validity to municipal law. The law which it enforced might, therefore, in one sense, be considered a branch of municipal law. Nevertheless, the distinction between municipal and international law was well defined. A court which administered municipal law was bound by and gave effect to the law as laid down by the sovereign State which called it into being. It need inquire only what that law was, but a court which administered international law must ascertain and give effect to a law which was not laid down by any particular State, but originated in the practice and usage long observed by civilized nations in their relations with each other or in express international agreement.

It was obvious that, if and so far as a court of prize in this country was bound by and gave effect to orders of the King in council purporting to prescribe or alter the international law, it was administering not international but municipal law; for an exercise of the prerogative could not impose legal obligation on anyone outside the King's Dominions who was not the King's subject. If an order in council were binding on the prize court such Court might be compelled to act contrary to the express terms of the commission from which it derived its jurisdiction.

There was yet another consideration which pointed to the same conclusion. The acts of a belligerent power in right of war were not justiciable in its own courts unless such power, as a matter of grace, submitted to their jurisdiction. Still less were such acts justiciable in the courts of any other power. As was said by Mr. Justice Story in the case of the *Invincible* (2 Gall. 43), "acts done under the authority of one sovereign can never be subject to the revision of the tribunals of another sovereign,

and the parties to such acts are not responsible therefor in their individual capacity." It followed that, but for the existence of courts of prize, no one aggrieved by the acts of a belligerent power in times of war could obtain redress otherwise than through diplomatic channels and at a risk of disturbing international amity. An appropriate remedy was, however, provided by the fact that, according to international law, every belligerent power must appoint and submit to the jurisdiction of a prize court, to which any person aggrieved had access, and which administered international as opposed to municipal law—a law which was theoretically the same, whether the court which administered it was constituted under the municipal law of the belligerent power or of the sovereign of the person aggrieved, and was equally binding on both parties to the litigation. It had long been well settled by diplomatic usage that, in view of the remedy thus afforded, a neutral aggrieved by any act of a belligerent power cognizable in a court of prize ought, before resorting to diplomatic intervention, to exhaust his remedies in the prize courts of the belligerent power.

Diplomatic redress.

A case for such intervention arose only if the decisions of those courts were such as to amount to a gross miscarriage of justice. It was obvious, however, that the reason for that rule of diplomacy would entirely vanish if a court of prize, while nominally administering a law of international obligation, were in reality acting under the direction of the Executive of the belligerent power.

It could not, of course, be disputed that a prize court, like any other court, was bound by the legislative enactments of its own sovereign State. A British prize court would certainly be bound by acts of the imperial legislature. But it was none the less true if the imperial legislature passed an act the provisions of which were inconsistent with the law of nations, the prize court in giving effect to such provisions would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a prize court. Even if the provisions of the act were merely declaratory of the international law, the authority of the court as an interpreter of the law of nations would be thereby materially weakened, for no one could say whether its decisions were based on a due consideration of international obligations or on the binding nature of the act itself. The fact, however, that the

National law.

prize courts in this country would be bound by acts of the imperial legislature afforded no ground for arguing that they were bound by the executive orders of the King in council.

Continuing, Lord Parker said:

In connection with the foregoing considerations, their Lordships attach considerable importance to the report dated January 18, 1753, of the committee appointed by his Britannic Majesty to reply to the complaints of Frederick II of Prussia as to certain captures of Prussian vessels made by British ships during the war with France and Spain, which broke out in 1744. By way of reprisals for these captures, the Prussian King had suspended the payment of interest on the Silesian loan. The report, which derives additional authority from the fact that it was signed by Mr. William Murray, the solicitor general, afterwards Lord Mansfield, contains a valuable statement as to the law administered by courts of prize. This is stated to be the law of nations, modified in some cases by particular treaties. "If," says the report, "a subject of the King of Prussia is injured by or has a demand upon any person here, he ought to apply to your Majesty's courts of justice, which are equally open and indifferent to foreigner or native; so, vice versa, if a subject here is wronged by a person living in the Dominions of his Prussian Majesty, he ought to apply for redress in the King of Prussia's courts of justice. If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions. The law of nations, founded upon justice, equity, conscience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the State, and justice absolutely denied in re minime dubia by all the tribunals and afterwards by the prince. When the judges are left free and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions different men think and judge differently, and all a friend can desire is that justice should be impartially administered to him as it is to the subjects of that prince in whose courts the matter is tried." The report further points out that in England "the Crown never interferes with the course of justice. No order or intimation is given to any judge." It also

Case of 1753.

contains the following statement: "All captures at sea as prize in time of war must be judged of in the court of admiralty according to the law of nations and particular treaties, if there are any. There never existed a case where a court, judging according to the laws of England only, took cognizance of prize. * * * It never was imagined that the property of a foreign subject taken as prize on the high seas could be affected by laws peculiar to England." This report is, in their lordships' opinion, conclusive that in 1753 any notion of a prize court being bound by the executive orders of the Crown or having to administer municipal as opposed to international law, was contrary to the best legal opinion of the day.

The attorney general was unable to cite any case in which an order of the King in council had as to matters of law been held to be binding on a court of prize. He relied chiefly on the judgment of Lord Stowell in the case of the *Fox* (Edw. 311). The actual decision in this case was to the effect that there was nothing inconsistent with the law of nations in certain orders in council made by way of reprisals for the Berlin and Milan decrees, though if there had been no case for reprisals, the orders would not have been justified by international law. The decision proceeded upon the principle that where there is just cause for retaliation neutrals may by the law of nations be required to submit to inconvenience from the acts of a belligerent power greater in degree than would be justified had no just cause for retaliation arisen, a principle which had been already laid down in the *Lucy* (Edw. 122).

Retaliation.

The judgment of Lord Stowell contains, however, a remarkable passage quoted in full in the court below, which refers to the King in council possessing "legislative rights" over a court of prize analogous to those possessed by Parliament over the courts of common law. At most this amounts to a dictum, and in their lordships' opinion, with all due respect to so great an authority, the dictum is erroneous. It is, in fact, quite irreconcilable with the principles enunciated by Lord Stowell himself. For example, in the *Maria*, a Swedish ship (1 C. Rob. 340), his judgment contains the following passage: "The seat of judicial authority is indeed locally here in the belligerent country, according to the known law and practice of nations, but the law itself has no locality. It is the duty

Lord Stowell on prize court.

of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm, to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden as a neutral country which he would not admit to belong to Great Britain in the same character." It is impossible to reconcile this passage with the proposition that the prize court is to take its law from orders in council. Moreover, if such a proposition were correct the court might at any time be deprived of the right which is well recognized of determining according to law whether a blockade is rendered invalid either because it is ineffective, or because it is partial in its operation (see the *Franciska*, 10 Moore, P. C. 37). Moreover, in the *Lucy*, above referred to, Lord Stowell had, in effect, refused to give effect to the order in council on which the captors relied.

Lord Stowell's dictum gave rise to considerable contemporaneous criticism, and is definitely rejected by Sir R. Phillimore ("Int. Law," Vol. III., sec. 436). It is said to have been approved by Mr. Justice Story in the case of Maisonnaire *v.* Keating (2 Gall. 325), but it will be found that Mr. Justice Story's remarks, on which some reliance seems to have been placed by the president in this case, are directed not to the liability of captors in their own courts of prize, but to their liability in the courts of other nations. He is in effect repeating the opinion he expressed in the case of the *Invincible*, to which their lordships have already referred. An act, though illegal by international law, will not on that account be justiciable in the tribunals of another power—at any rate if expressly authorized by order of the sovereign on whose behalf it is done.

Their lordships have come to the conclusion, therefore, that at any rate prior to the naval prize act, 1864, there was no power in the Crown, by order in council, to prescribe or alter the law which prize courts have to administer. It was suggested that the naval prize act, 1864, confers such a power. Under that act the court of admiralty became a permanent court of prize, independent of any commission issued under the great seal. The act, however, by section 55, while saving the King's prerogative, on the one hand, saves, on the other hand, the jurisdiction of the court to decide judicially, and in accordance with international law. Subject, therefore, to any express provisions con-

Crown and prize court.

tained in other sections, it leaves matters exactly as they stood before it was passed. The only express provisions which confer powers on the King in council are: (1) Those contained in section 13 (now repealed and superseded by sec. 3 of the prize court act, 1894), conferring a power of making rules as to the practice and procedure of prize courts; and (2) those contained in section 53, conferring power to make such orders as may be necessary for the better execution of the act.

Their lordships are of opinion that the latter power does not extend to prescribing or altering the law to be administered by the court, but merely to giving such executive directions as may from time to time be necessary. In all respects material to the present question, the law therefore remains the same as it was before the act, nor has it been affected by the substitution under the supreme court of judicature acts, 1873 and 1891, of the high court of justice for the court of admiralty as the permanent court of prize in this country.

There are two further points requiring notice in this part of the case. The first arises on the argument addressed to the board by the solicitor general. It may be, he said, that the court would not be bound by an order in council which is manifestly contrary to the established rules of international law, but there are regions in which such law is imperfectly ascertained and defined; and, when this is so, it would not be unreasonable to hold that the court should subordinate its own opinion to the directions of the executive. This argument is open to the same objection as the argument of the attorney general. If the court is to decide judicially in accordance with what it conceives to be the law of nations, it can not, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfill its function as a prize court and justify the confidence which other nations have hitherto placed in its decisions.

Force of international law.

The second point requiring notice is this: It does not follow that, because orders in council can not prescribe or alter the law to be administered by the prize court, such court will ignore them entirely. On the contrary, it will act on them in every case in which they amount to a mitigation of the Crown rights in favor of the enemy or

neutral, as the case may be. As explained in the case of the *Odessa* (32 The Times L. R. 103; [1916] A. C. 145), the Crown's prerogative of bounty is unaffected by the fact that the proceeds of the Crown rights or Admiralty droits are now made part of the consolidated fund and do not replenish the privy purse. Further, the prize court will take judicial notice of every order in council material to the consideration of matters with which it has to deal, and will give the utmost weight and importance to every such order short of treating it as an authoritative and binding declaration of law. Thus, an order declaring a blockade will prima facie justify the capture and condemnation of vessels attempting to enter the blockaded ports, but will not preclude evidence to show that the blockade is ineffective, and therefore unlawful An order authorizing reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case. Further, it can not be assumed, until there be a decision of the prize court to that effect, that any executive order is contrary to law, and all such orders, if acquiesced in and not declared to be illegal, will, in the course of time, be themselves evidence by which international law and usage may be established. (See Wheaton's "Int. Law," 4th English Ed., pp. 25 and 26.)

Force of order in council.

On this part of the case, therefore, their lordships hold that Order XXIX, rule 1, of the prize court rules, construed as an imperative direction to the court, is not binding. Under these circumstances the rule must, if possible, be construed merely as a direction to the court in cases in which it may be determined that, according to international law, the Crown has a right to requisition the vessel or goods of enemies or neutrals. There is much to warrant this construction, for the order in council, by which the prize court rules were made, conforms to the provisions of the rules publication act, 1893, and on reference to that act it will be found inapplicable to orders in council, the validity of which depends on an exercise of the prerogative. It is reasonable, therefore,

to assume that the words "or otherwise," contained in the order in council, refer to such other powers, if any, as the Crown possesses of making rules and not to powers vested in the Crown by virtue of the prerogative.

The next question which arises for decision is whether the order appealed from can be justified under any power inherent in the court as to the sale or realization of property in its custody pending decision of the question to whom such property belongs. It can not, in their lordships' opinion, be held that the court has any such inherent power as laid down by the president in this case. The primary duty of the prize court (as indeed of all courts having the custody of property the subject of litigation) is to preserve the res for delivery to the persons who ultimately establish their title. The inherent power of the court as to sale or realization is confined to cases where this can not be done, either because the res is perishable in its nature, or because there is some other circumstance which renders its preservation impossible or difficult. In such cases it is in the interest of all parties to the litigation that it should be sold or realized, and the court will not allow the interests of the real owner to be prejudiced by any perverse opposition on the part of a rival claimant. Such a limited power would not justify the court in directing a sale of the res merely because it thought fit so to do, or merely because one of the parties desired the sale or claimed to become the purchaser.

Duty of court.

It remains to consider the third and perhaps the most difficult question which arises on this appeal—the question whether the Crown has, independently of Order XXIX, rule 1, any and what right to requisition vessels or goods in the custody of the prize court pending the decision of the court as to their condemnation or release. In arguing this question the attorney general again laid considerable stress on the Crown's prerogative, referring to the recent decision of the court of appeal in this country re a petition of right (31 The Times L. R. 596; [1915] 3 K. B. 649). There is no doubt that under certain circumstances and for certain purposes the Crown may requisition any property within the realm belonging to its own subjects. But this right being one conferred by municipal law is not, as such, enforceable in a court which administers international law. The fact, however, that the Crown possesses such a right in this country,

Right to requisition.

and that somewhat similar rights are claimed by most civilized nations, may well give rise to the expectation that, at any rate in times of war, some right on the part of a belligerent power to requisition the goods of neutrals within its jurisdiction will be found to be recognized by international usage. Such usage might be expected either to sanction the right of each country to apply in this respect its own municipal law, or to recognize a similar right of international obligation.

In support of the former alternative, which is apparently accepted by Albrecht ("Zeitschrift für Völkerrecht und Bundesstaatsrecht," VI. Band, Breslau, 1912), it may be argued that the mere fact of the property of neutrals being found within the jurisdiction of a belligerent power ought, according to international law, to render it subject to the municipal law of that jurisdiction. The argument is certainly plausible and may in certain cases and for such purposes be sound. In general, property belonging to the subject of one power is not found within territory of another power without the consent of the true owner, and this consent may well operate as a submission to the municipal law. A distinction may perhaps be drawn in this respect between property the presence of which within the jurisdiction is of a permanent nature and property the presence of which within the jurisdiction is temporary only. The goods of a foreigner carrying on business here are not in the same position as a vessel using an English port as a port of call. Even in the latter case, however, it is clear that for some purposes, as, for example, sanitary or police regulations, it would become subject to the lex loci. After all, no vessel is under ordinary circumstances under any compulsion to come within the jurisdiction. Different considerations arise with regard to a vessel brought within the territorial jurisdiction in exercise of a right of war. In the latter case there is no consent of the owner or of anyone whose consent might impose obligations on the owner. Nevertheless, even here, the vessel might well for police and sanitary purposes become subject to the municipal law. To hold, however, that it became so subject for all purposes, including the municipal right of requisition, would give rise to various anomalies.

The municipal law of one nation in respect of the right to requisition the property of its subjects differs or may

differ from that of another nation. The circumstances under which, the purposes for which, and the conditions subject to which the right may be exercised need not be the same. The municipal law of this country does not give compensation to a subject whose land or goods are requisitioned by the Crown. The municipal law of other nations may insist on compensation as a condition of the right. The circumstances and purposes under and for which the right can be exercised may similarly vary. It would be anomalous if the international law by which all nations are bound could only be ascertained by an inquiry into the municipal law which prevails in each. It would be a still greater anomaly if in times of war a belligerent could, by altering his municipal law in this respect, affect the rights of other nations or their subjects. The authorities point to the conclusion that international usage has in this respect developed a law of its own and has not recognized the right of each nation to apply its own municipal law.

The right of a belligerent to requisition the goods of neutrals found within its territory, or territory of which it is in military occupation, is recognized by a number of writers on international law. It is sometimes referred to as the right of angary, and is generally recognized as involving an obligation to make full compensation. There is, however, much difference of opinion as to the precise circumstances under which and the precise purposes for which it may be lawfully exercised. It was exercised by Germany during the Franco-German War of 1870 in respect of property belonging to British and Austrian subjects. The German military authorities seized certain British ships and sank them in the Seine. They also seized certain Austrian rolling stock and utilized it for the transport of troops and munitions of war. The German Government offered full compensation, and its action was not made the subject of diplomatic protest, at any rate by Great Britain. In justifying the action of the military authorities with regard to the British ships, Count von Bismarck laid stress on the fact "that a pressing danger was at hand and every other method of meeting it was wanting, so that the case was one of necessity," and he referred to Phillimore, "Int. Law," Volume III., section 29. He did not rely on the municipal law of either France or Germany.

Angary.

Necessity.

On reference to Phillimore it will be found that he limits the right to cases of "clear and overwhelming necessity." In this he agrees with De Martens, who speaks of the right existing only in cases of "extreme necessity" ("Law of Nations," Book VI., sec. 7); and with Gessner, who says the necessity must be real; that there must be no other means less violent "de sauver l'existence," and that neither the desire to injure the enemy nor the greatest degree of convenience to the belligerent is sufficient. ("Droits des Neutres," p. 154, 2d ed., Berlin, 1876.) It is difficult to see how the acts of the German Government to which reference has been made come within the limits thus laid down. It might have been convenient to Germany and hurtful to France to sink English vessels in the Seine or to utilize Austrian rolling stock for transport purposes, but clearly no extreme necessity involving actual existence had arisen. Azuni, on the other hand ("Droit maritime de l'Europe," Vol. I., c 3, art. 5), thought that an exercise of the right would be justified by necessity or public utility; in other words, that a very high degree of convenience to the belligerent power would be sufficient. Germany must be taken to have asserted and England and Austria to have acquiesced in the latter view, which is the view taken by Bluntschli ("Droit International," section 795 bis) and in the only British prize decision dealing with this point.

War of 1812.

The case to which their lordships refer is that of the *Curlew*, the *Magnet*, etc., reported in Stewart's vice admiralty cases (Nova Scotia), page 312. The ships in question with their cargoes had been seized by the British authorities as prize in the early days of the war with the United States of America which broke out in 1812, and had been brought into port for adjudication. The lieutenant governor of the Province and the admiral and commander in chief of His Majesty's ships on that station thereupon presented a petition for leave to requisition some of the ships and parts of the cargoes pending adjudication. In his judgment Doctor Croke lays it down that though as a rule the court has no power of selling or bartering vessels or goods in its custody, prior to adjudication to any departments of His Majesty's service, nevertheless there may be cases of necessity in which the right of self-defense supersedes and dispenses with the usual modes of procedure. He held that such a case had

in fact arisen, and accordingly granted the prayer of the petitioners: (1) As to certain small arms "very much and immediately needed for the defense of the Province"; (2) as to certain oak timbers of which there was "great want" in His Majesty's naval yard at Halifax: and (3) as to a vessel immediately required for use as a prison ship. The appraised value of the property requisitioned was in each case ordered to be brought into court.

Goods before court.

It should be observed that with regard to ships and goods of neutrals in the custody of the prize court for adjudication, there are special reasons which render it reasonable that the belligerent should in a proper case have the power to requisition them. The legal property or dominion is, no doubt, still in the neutral, but ultimate condemnation will vest it in the Crown, as from the date of the seizure as prize, and meanwhile all beneficial enjoyment is suspended. In cases where the ships or the goods are required for immediate use, this may well entail hardship on the party who ultimately establishes his title. To mitigate the hardship in the case of a ship a custom has arisen of releasing it to the claimant on bail; that is, on giving security for the payment of its appraised value. It may well be that in practice this was never done without the consent of the Crown, but such consent would not be likely to be withheld, unless the Crown itself desired to use the ship after condemnation. The twenty-fifth section of the naval prize act, 1864, now confers on the judge full discretion in the matter. This being so, it is not unreasonable that the Crown on its side should in a proper case have power to requisition either vessel or goods for the national safety. It must be remembered that the neutral may obtain compensation for loss suffered by reason of an improper seizure of his vessel or goods, but the Crown can never obtain compensation from the neutral in respect of loss occasioned by a claim to release which ultimately fails.

The power in question was asserted by the United States of America in the Civil War which broke out in 1861. In the *Memphis* (Blatchford, 202), in the *Ella Warley* (Blatchford, 204), and in the *Stephen Hart* (Blatchford, 387), Betts, J., allowed the War Department to requisition goods in the custody of the prize court, and required for purposes in connection with the prosecution of the war. In the case of the *Peterhoff* (Blatchford, 381) he allowed the vessel itself to be similarly requisi-

tioned by the Navy Department. The reasons of Betts, J., as reported, are not very satisfactory, for they leave it in doubt whether he considered the right he was enforcing to be a right according to the municipal law of the United States overriding the international law or to be a right according to the international law. But his decisions were not appealed, nor does it appear that they led to any diplomatic protest.

On March 3, 1863, after the decisions above referred to, the United States Legislature passed an act (Congress, sess. III, c. 86, of 1863) whereby it was enacted (sec. 2) that the Secretary of the Navy or the Secretary of War should be and they or either of them were thereby authorized to take any captured vessel, any arms or munitions of war or other material for the use of the Government, and when the same should have been taken before being sent in for adjudication or afterwards, the department for whose use it was taken should deposit the value of the same in the Treasury of the United States, subject to the order of the court in which prize proceedings might be taken, or if no proceedings in prize should be taken, to be credited to the Navy Department and dealt with according to law.

It is impossible to suppose that the United States Legislature in passing this act intended to alter or modify the principles of international law in its own interest or against the interest of neutrals. On the contrary, the act must be regarded as embodying the considered opinion of the United States authorities as to the right possessed by a belligerent to requisition vessels or goods seized as prize before adjudication. Nevertheless, their lordships regard the passing of the act as somewhat unfortunate from the standpoint of the international lawyer. In the first place, it seems to cast some doubt upon the decisions already given by Betts, J. In the second place, it tends to weaken all subsequent decisions of the United States prize courts on the right to requisition vessels or goods, as authorities on international law, for these courts are bound by the provisions of the act, whether it be in accordance with international law or otherwise. In the third place, their lordships are of opinion that the provisions of the act go beyond what is justified by international usage. The right to requisition recognized by international law is not, in their opinion, an absolute right, but a right exercisable in certain circumstances

and for certain purposes only. Further, international usage requires all captures to be brought promptly into the prize court for adjudication, and the right to requisition, therefore, ought as a general rule to be exercised only when this has been done. It is for the court and not the executive of the belligerent State to decide whether the right claimed can be lawfully exercised in any particular case.

It appears that the British Government, shortly after the act was passed, protested against the provisions of the second section. The grounds for such protest appear in Lord Russell's dispatch of April 21, 1863. The first is the primary duty of the court to preserve the subject matter of the litigation for the party who ultimately establishes his title. In stating it Lord Russell ignores, and (having regard to the provisions of the section) was probably entitled to ignore, all exceptional cases based on the right of angary. The second ground is that such a general right as asserted in the section would encourage the making of seizures known at the time when they are made to be unwarrantable by law merely because the property seized might be useful to the belligerent. This objection is more serious, but it derives its chief force from the fact that the right asserted in the section can be exercised before the property seized is brought into the prize court for adjudication, and, even when it has been so brought in, precludes the judge from dealing judicially with the matter. If the right accorded by international law to requisition vessels or goods in the custody of the court be exercised through the court, and be confined to cases in which there is really a question to be tried, and the vessel or goods can not, therefore, be released forthwith, the objection is obviated.

Angary.

It further appears that the United States took the opinion of their own Attorney General on the matter (10th vol., Opinions of A. G. of U. S., p. 519), and were advised that there was no warrant for the section in international law, and that it would not be advisable to put it into force in cases where controversy was likely to arise. The Attorney General did not, any more than Lord Russell, refer to exceptional cases based on the right of angary, but dealt only with the provisions of the section as a whole.

Some stress was laid in argument on the cases cited in the judgment in the court below upon what is known

as "the right of preemption," but in their lordships' opinion these cases have little, if any, bearing on the matter now in controversy. The right of preemption appears to have arisen in the following manner: According to the British view of international law, naval stores were absolute contrabrand, and if found on a neutral vessel bound for an enemy port were lawful prize. Other countries contended that such stores were only contraband if destined for the use of the enemy Government. If destined for the use of civilians they were not contraband at all. Under these circumstances the British Government, by way of mitigation of the severity of its own view, consented to a kind of compromise. Instead of condemning such stores as lawful prize, it bought them out and out from their neutral owners, and this practice, after forming the subject of many particular treaties, at last came to be recognized as fully warranted by international law. It was, however, always confined to naval stores, and a purchase pursuant to it put an end to all litigation between the Crown on the one hand and the neutral owner on the other. Only in cases where the title of the neutral was in doubt and the property might turn out to be enemy property was the purchase money paid into court. It is obvious, therefore, that this "right of preemption" differs widely from the right to requisition the vessels or goods of neutrals, which is exercised without prejudice to, and does not conclude or otherwise affect the question whether the vessel or goods should or should not be condemned as prize.

Preemption.

Conclusions as to requisition.

On the whole question their lordships have come to the following conclusion: A belligerent power has by international law the right to requisition vessels or goods in the custody of its prize court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defense of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to the prize court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable.

With regard to the first of these limitations, their lordships are of opinion that the judge ought, as a rule, to treat the statement on oath of the proper officer of the Crown to the effect that the vessel or goods which it is desired to requisition are urgently required for use in connection with the defense of the realm, the prosecution of the war, or other matters involving national security, as conclusive of the fact. This is so in the analogous case of property being requisitioned under the municipal law (see Warrington, L. J., in the case of In re a Petition of Right, supra, at p. 666), and there is every reason why it should be so also in the case of property requisitioned under the international law. Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.

With regard to the second limitation, it can be best illustrated by referring to the old practice. The first hearing of a case in prize was upon the ship's papers, the answers of the master and others to the standing interrogatories and such special interrogatories as might have been allowed, and any further evidence which the judge, under special circumstances, thought it reasonable to admit. If, on this hearing, the judge was of opinion that the vessel or goods ought to be released forthwith, an order for release would in general be made. A further hearing was not readily granted at the instance of the Crown. If, on the other hand, the judge was of opinion that the vessel or goods could not be released forthwith, a further hearing would be granted at the instance of the claimant. If the claimant did not desire a further hearing, the vessel or goods would be condemned. This practice, though obviously unsuitable in many respects to modern conditions, had the advantage of demonstrating at an early stage of the proceedings whether there was a real question to be tried, or whether there ought to be an immediate release of the vessel or goods in question. In their lordships' opinion the judge should, before allowing a vessel or goods to be requisitioned, satisfy himself (having regard, of course, to modern conditions) that there is a real case for investigation and trial, and that the circumstances are not such as would justify the immediate release of the

vessel or goods. The application for leave to requisition must, under the existing practice, be an interlocutory application, and, in view of what has been said, it should be supported by evidence sufficient to satisfy the judge in this respect. In this manner Lord Russell's objection as to the encouragement of unwarranted seizures is altogether obviated.

With regard to the third limitation, it is based on the principle that the jurisdiction of the prize court commences as soon as there is a seizure in prize. If the captors do not promptly bring in the property seized for adjudication, the court will, at the instance of any party aggrieved, compel them so to do. From the moment of seizure, the rights of all parties are governed by international law. It was suggested in argument that a vessel brought into harbor for search might, before seizure, be requisitioned under the municipal law. This point, if it ever arises, would fall to be decided by a court administering municipal law, but from the point of view of international law it would be a misfortune if the practice of bringing a vessel into harbor for the purpose of search—a practice which is justifiable because search at sea is impossible under the conditions of modern warfare—were held to give rise to rights which could not arise if the search took place at sea.

It remains to apply what has been said to the present case. In their lordships' opinion, the order appealed from was wrong, not because, as contended by the appellants, there is by international law no right at all to requisition ships or goods in the custody of the court but because the judge had before him no satisfactory evidence that such a right was exercisable. The affidavit of the director of army contracts, following the words of Order XXIX, rule 1, merely states that it is desired on behalf of His Majesty to requisition the copper in question. It does not state that the copper is urgently required for national purposes. Further, the affidavit of Sven Hoglund, which is unanswered, so far from showing that there was any real case to be tried, suggests a case for immediate release. Under these circumstances, the normal course would be to discharge the order appealed from without prejudice to another application by the procurator general supported by proper evidence. But the copper in question has long since been handed over to the war department, and, if not used up, at any rate can not now be identified. No

order for its restoration can therefore be made, and it would be wrong to require the Government to provide other copper in its place. Under the old procedure, the proper course would have been to give the appellant, in case his claim to the copper be ultimately allowed, leave to apply to the court for any damage he may have suffered by reason of its having been taken by the Government under the order.

It was, however, suggested that the procedure prescribed by the existing prize court rules precludes the possibility of the court awarding damages or costs in the existing proceedings. Under the old practice the captors were parties to every proceeding for condemnation, and damages and costs could in a proper case have been awarded as against them. But every action for condemnation is now instituted by the procurator general on behalf of the Crown, and the captors are not necessarily parties. It is said that neither damages nor costs can be awarded against the Crown. It is not suggested that the persons entitled to such damages or costs are deprived of all remedy, but it is urged that in order to recover either damages or costs, if damages or costs are claimed, they must themselves institute fresh proceedings as plaintiffs, not against the Crown, but against the actual captors. This result would, in their lordships' opinion, be extremely inconvenient, and would entail considerable hardship on claimants. If possible, therefore, the prize court rules ought to be construed so as to avoid it, and, in their lordships' opinion, the prize court rules can be so construed.

It will be observed that, by Order I, rule 1, the expression "captor" is, for the purposes of proceedings in any cause or matter, to include "the proper officer of the Crown," and "the proper officer of the Crown" is defined as the King's proctor or other law officer or agent authorized to conduct prize proceedings on behalf of the Crown within the jurisdiction of the court.

Review of order.

It is provided by Order II, rule 3, that every cause instituted for the condemnation of a ship or (by virtue of Order I, rule 2) goods shall be instituted in the name of the Crown, though the proceedings therein may, with the consent of the Crown, be conducted by the actual captors. By Order II, rule 7, in a cause instituted against the "captor" for requisition or damages, the writ is to be in the form No. 4 of Appendix A. This would appear to contemplate that an action for damages can be instituted

against the proper officer of the Crown, any argument to the contrary, based upon the form of writ as originally framed, being rendered invalid by the alterations in such form introduced by rule No. 5 of the prize court rules under the order in council dated March 11, 1915. It is not, however, necessary to decide this point.

Order V provides for proceedings in case of failure to proceed by captors. Under rules 1 and 2, which contemplate the case of no proceedings having been yet instituted, the claimant must issue a writ, and can then apply for relief by way of restitution, with or without damages and costs. It does not appear against whom the writ is to be issued, whether against the actual captors or the proper officer of the Crown who ought to have instituted proceedings. Under rule 3, however, which contemplates that proceedings have been instituted, it is provided that, if the captors (which, in the case of an action for condemnation, must, of course, mean the proper officer of the Crown) fail to take any steps within the respective times provided by the rules, or, in the opinion of the judge, fail to prosecute with effect the proceedings for adjudication, the judge may, on the application of a claimant, order the property to be released to the claimant, and may make such order as to damages or costs as he thinks fit. This rule, therefore, distinctly contemplates that the Crown or its proper officer may be made liable for damages or costs. Neither damages nor costs could be awarded against persons who were not parties to the proceedings, and it can hardly have been the intention of the rules to make third parties liable for the default of those who were actually conducting the proceedings.

By Order VI proceedings may be discontinued by leave of the judge, but such discontinuance is not to affect the right, if any, of the claimant to costs and damages. This again contemplates that in an action for condemnation the claimant may have a right to costs and damages and, as the Crown is the only proper plaintiff in such an action, to costs and damages against the Crown.

Order XIII is concerned with releases. They are to be issued out of the registry and, except in the six cases referred to in rule 3, only with the consent of the judge. One of the accepted cases is when the property is the subject of proceedings for condemnation—that is, of proceedings in which the crown by its proper officer is

plaintiff, and when a consent to restitution signed by the captor (again by the proper officer of the Crown) has been filed. Another excepted case is when proceedings instituted by or on behalf of the Crown are discontinued. By rule 4 no release is to affect the right of any of the owners of the property to costs and damages against the "captor," unless so ordered by the judge. In the cases last referred to "captor" must again mean the proper officer who is suing on behalf of the Crown.

Order XLIV deals with appeals, and provides that in every case the appellant must give security for costs to the satisfaction of the judge. In cases of appeals from a condemnation or in other cases in which the Crown by its proper officer would be a respondent, this provision could serve no useful purpose unless costs could be awarded in favor of the Crown, and if costs can be awarded in favor of, it follows that they can similarly be awarded against the Crown.

It is to be observed that unless the judgment or order appealed from be stayed pending appeal, rule 4 of this order contemplates that persons in whose favor it is executed will give security for the due performance of such order as His Majesty in council may think fit to make. Their lordships were not informed whether such security was given in the present case.

In their lordships' opinion these rules are framed on the footing that where the Crown by its proper officer is a party to the proceedings it takes upon itself the liability as to damages and costs to which under the old procedure the actual captors were subject. This is precisely what might be expected, for otherwise the rules would tend to hamper claimants in pursuing the remedies open to them according to international law. The matter is somewhat technical, for even under the old procedure the Crown, as a general rule, in fact defrayed the damages and costs to which the captors might be held liable. The common law rule that the Crown neither paid nor received costs is, as pointed out by Lord Macnaghten, in Johnson *v.* The King (20 The Times L. R. 697; [1904] A. C. 817) subject to exceptions.

Decision.

Their lordships, therefore, have come to the conclusion that in proceedings to which, under the new practice, the Crown instead of the actual captors is a party, both damages and costs may in a proper case be awarded against the Crown or the officer who in such proceedings represents the Crown.

The proper course, therefore, in the present case is to declare that upon the evidence before the president he was not justified in making the order the subject of this appeal and to give the appellants leave in the event of their ultimately succeeding in the proceedings for condemnation to apply to the court below for such damages, if any, as they may have sustained by reason of the order and what has been done under it.

Their lordships will humbly advise His Majesty accordingly, but inasmuch as the case put forward by the appellants has succeeded in part only, they do not think that any order should be made as to the costs of the appeal.

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## "COMTE DE SMET DE NAEYER."

November 17, 1916.

[1] Entscheidungen des Oberprisengerichts, 209.

In the prize matter concerning the Belgian full-rigged ship *Comte de Smet de Naeyer*, Antwerp being her home port, the imperial superior prize court of Berlin, in the sitting of November 17, 1916, has found as follows:

Decision.

"As a result of the appeal of the imperial commissary the decision of the Hamburg Prize Court of May 20, 1916, is annulled. The ship is to be condemned. The claim is refused. The plaintiff must bear the costs of both instances."

### REASONS.

Statement of the case.

After the capture of Antwerp, along with other Belgian ships lying in that port, the full-rigged ship *Comte de Smet de Naeyer* was seized by the German military forces.

The ship was built of steel in 1877 and until 1906 was used as a freight ship. In the latter year she was acquired by the Belgian company, "Association Maritime Belge, S. A.," of Antwerp, with a capital of 500,000 francs, the aims and purposes of which are stated as follows:

l'armement, l'exploitation, l'affrêtement, l'achat, la location et vente de navires à voile et à vapeur et toutes les opérations de commerce, d'industrie et de finances se rattachant à quelque titre que ce soit à la navigation maritime et fluviale, etc.

Le ou les navires de la société pourront être affectés à l'enseignement professionnel maritime, etc.

The company has repeatedly obtained subventions from the Belgian Government which is in possession of obligations of the company to the amount of 412,000 francs. The school of navigation established by the company is under the supervision of the State.

School ship.

After the company had secured the ship the latter did not again leave the harbor of Antwerp. She was used as a school ship and was supplied with special equipment for purposes of instruction, which would have to be removed should she again serve for ocean-going purposes. Her last certificate of classification is dated October, 1910. For sea trips the school owns the four-masted bark *l'Avenir*.

Upon notification by the imperial prize court of Hamburg, the owner has submitted a claim for the release of the ship.

The prize court found for the release of the ship. The appeal from this decision entered by the imperial commissary is well founded.

"Merchant ship."

As has been explained in detail in the decision of the competent court of October 6, 1916, in the matter of the *Primavera*, the prize regulations in agreement with the London declaration are to be understood to mean by the expression "Merchant ships" any ocean-going ship that is not the property of the State. If this results distinctly from article 2 of the prize court regulations according to which only neutral public ships are excepted from the exercise of the prize law, it is also explicitly stated in the London conference that the expression "navire de commerce" includes all ships that are not public ships, and, accordingly, in article 6 of the prize regulations, it was regarded as necessary by way of exception to exempt certain ships from seizure that are not built to enter ocean service for gain, and, therefore, would not be regarded as merchant ships in the narrower sense. Therefore, application of the prize law to a school ship can not be objected to.

Owner.

The ship is owned by a Belgian joint-stock company whose purposes are commercial enterprises of every sort. Therefore, it is not a public ship. It does not require further exposition to show that this is in no way changed by the fact that the Belgian State occasionally grants subventions to the corporation and has taken over a considerable number of bonds of the said company. Nor is it of importance that for years, or since she be-

came a school ship, the ship has no longer gone on ocean trips, but has been lying at anchor in the port of Antwerp. It is true that as stated by the plaintiff, lighters, small tug boats and similar craft, which merely serve for port traffic, are not subject to the rules of maritime warfare (Cf. decision of this court of June 27, 1916).

On the other hand, the ship in question did not cease, even in the office it was fulfilling at that time, to be a seagoing ship; she can, moreover, easily be retransformed into a seagoing freight ship, while it does not matter what it would have been necessary to do to make her seaworthy for any and all purposes.

Port of Antwerp.

We need not discuss whether or not at the time of the seizure, the port of Antwerp was a place of maritime war operations. The right of prize is not exercised merely in a place of war operations, but wheresoever sea navigation takes place, and, accordingly, not simply on the high seas, but also in bays and ports that serve as bases for ocean-going traffic. This is no less true as regards the port of Antwerp because the mouth of the Escaut is not in Belgian jurisdiction.

Hague Convention XI.

Finally it can also not be admitted that, as the lower instance assumed, school ships belong to those ships which, according to article 4 of the XI convention of the Second Hague Conference are intrusted with scientific missions.

Scientific purposes.

Whether this article 4, according to its purport, is to be interpreted rather in an extensive than in a restrictive sense, as the judge of first instance believes, need not here be discussed, because its text is clear and requires no special interpretation. It is evident that a school ship serves no scientific purposes. To be sure, to the thorough training of a ship's officer and ship's captain, a certain scientific basis is necessary, and it can not be gainsaid that at naval schools instruction is imparted in scientific subjects, mathematics, astronomy, etc. It may even be admitted that not only the research but also the instruction is a problem of science. The latter, however, only in so far as science as such is taught, as the distinct and definite science, as one in all its branches, and in so far as it serves for the development of scholars or as a preliminary study for one of the learned professions. Seamanship is not a scholarly, but a practical profession. The naval school is not a school for the sciences, but a professional school. It can no more be said of such a school than of a mining school in which also a theoretical

and, therefore, scientific basis is laid, that it concerns itself with scientific problems.

If, therefore, the plaintiff can not justify his appeal upon the exception specified under article 6 of the prize regulations, because the seized ship is a school ship, it requires no further examination to see whether the application of this same article 6 would also be excluded on the ground that after the capture of Antwerp, as must be assumed, the operation of the naval school came to an end, so that at the time of the seizure the ship, at all events, no longer served purposes of instruction.

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### THE "APPAM."

March 6, 1917.

243 U. S. Reports, 124.

Mr. Justice Day delivered the opinion of the court:

These are appeals from the District Court of the United States for the Eastern District of Virginia, in two admiralty cases. No. 650 was brought by the British & African Steam Navigation Co. (Ltd.), owner of the British steamship *Appam*, to recover possession of that vessel. No. 722 was a suit by the master of the *Appam* to recover possession of the cargo. In each of the cases the decree was in favor of the libellant.

Facts of case.

The facts are not in dispute, and from them it appears: That during the existence of the present war between Great Britain and Germany, on the 15th day of January, 1916, the steamship *Appam* was captured on the high seas by the German cruiser, *Moewe*. The *Appam* was a ship under the British flag, registered as an English vessel, and is a modern cargo and passenger steamship of 7,800 tons burden. At the time of her capture she was returning from the West Coast of Africa to Liverpool, carrying a general cargo of cocoa beans, palm oil kernels, tin, maize, 16 boxes of specie, and some other articles. At the West African port she took on 170 passengers, 8 of whom were military prisoners of the English Government. She had a crew of 160 or thereabouts, and carried a 3-pound gun at the stern. The *Appam* was brought to by a shot across her bows from the *Moewe*, when about a hundred yards away, and was boarded without resistance by an armed crew from the *Moewe*. This crew brought with them two bombs, one of which was

slung over the bow and the other over the stern of the *Appam*. An officer from the *Moewe* said to the captain of the *Appam* that he was sorry he had to take his ship, asked him how many passengers he had, what cargo, whether he had any specie, and how much coal. When the shot was fired across the bows of the *Appam*, the captain instructed the wireless operator not to touch the wireless instrument, and his officers not to let anyone touch the gun on board. The officers and crew of the *Appam*, with the exception of the engine room force, 35 in number, and the second officer, were ordered on board the *Moewe*. The captain, officers, and crew of the *Appam* were sent below, where they were held until the evening of the 17th of January, when they and about 150 others, officers and crews of certain vessels previously sunk by the *Moewe*, were ordered back to the *Appam* and kept there as prisoners. At the time of the capture, the senior officer of the boarding party told the chief engineer of the *Appam* he was now a member of the German Navy; if he did not obey orders his brains would be blown out, but if he obeyed, not a hair of his head should be touched. The *Appam's* officer was instructed to tell his staff the same thing, and if they did not obey orders they would be brought to the German officer and shot. Inquiries were made by the German officer in command of the *Appam* as to revolutions of the engines, the quantity of coal on hand and the coal consumption for different speeds, and instructions were given that steam be kept up handy, and afterwards the engineer was directed to set the engines at the revolutions required, and the ship got under way.

**Treatment.**

Lieutenant Berg, who was the German officer in command of the *Appam* after its capture, told the engineer on the second morning that he was then in charge of the ship, asked of him information as to fuel consumption, and said that he expected the engineer to help him all he could, and the more he did for him the better it would be for everybody on the ship. The engineer said he would, and did so. The engines were operated with a bomb secured to the port main injector valve, and a German sailor stationed alongside the bomb with a revolver. There was a guard below of four or five armed Germans, who were relieved from time to time, but did not interfere with the working of the ship. The German officer, Lieutenant Berg, gave directions as to working the engines, and was the only officer on board who wore a uniform.

On the night of the capture, the specie in the specie room was taken on board the *Moewe*. After Lieutenant Berg took charge of the *Appam*, bombs were slung over her bow and stern, one large bomb, said to contain about 200 pounds of explosive, was placed on the bridge, and several smaller ones in the chart room. Lieutenant Berg informed the captain of the *Appam*, pointing to one of the bombs, "That is a bomb; if there is any trouble, mutiny, or attempt to take the ship, I have orders to blow up the ship instantly." He also said, "There are other bombs about the ship; I do not want to use them, but I shall be compelled to if there is any trouble." The bombs were kept in the positions stated until the ship arrived at the Virginia Capes, when they were removed. Lieutenant Berg, on reaching Hampton Roads, asked the crew of the *Appam* to drop the anchor, as he had not men to do it.

During the trip to the westward, the officers and crew of the *Appam* were not allowed to see the ship's compass to ascertain her course, and all lights were obscured during the voyage. The German prisoners, with the exception of two who went on board the *Moewe*, were armed and placed over the passengers and crew of the *Appam* as a guard all the way across. For two days after the capture, the *Appam* remained in the vicinity of the *Moewe*, and then was started westward. Her course for the first two or three days was southwesterly, and afterwards westerly, and was continued until her arrival at the Virginia Capes on the 31st of January. The engine-room staff of the *Appam* was on duty operating the vessel across to the United States; the deck crew of the *Appam* kept the ship clean, and the navigation was conducted entirely by the Germans, the lookouts being mostly German prisoners.

At the time of the capture, the *Appam* was approximately distant 1,590 miles from Emden, the nearest German port; from the nearest available port, namely, Punchello, in the Madeiras, 130 miles; from Liverpool, 1,450 miles; and from Hampton Roads, 3,051 miles. The *Appam* was found to be in first-class order, seaworthy, with plenty of provisions, both when captured and at the time of her arrival in Hampton Roads.

The order or commission delivered to Lieutenant Berg by the commander of the *Moewe* is as follows:

Instructions to Prize Master.

"Information for the American authorities. The bearer of this, lieutenant of the naval reserve, Berg, is appointed by me to the command of the captured English steamer *Appam* and has orders to bring the ship into the nearest American harbor and there to lay up. Kommando S. M. H. *Moewe*. Count Zu Dohna, cruiser captain and commander. (Imperial Navy Stamp.) Kommando S. M. H. *Moewe*."

Upon arrival in Hampton Roads, Lieutenant Berg reported his arrival to the collector, and filed a copy of his instructions to bring the *Appam* into the nearest American port and there to lay up.

On February 2, his excellency, the German ambassador, informed the State Department of the intention, under alleged treaty rights, to stay in an American port until further notice, and requested that the crew of the *Appam* be detained in the United States for the remainder of the war.

The prisoners brought in by the *Appam* were released by order of the American Government.

Libel.

On February 16, and 16 days after the arrival of the *Appam* in Hampton Roads, the owner of the *Appam* filed the libel in case No. 650, to which answer was filed on March 3. On March 7, by leave of court, an amended libel was filed, by which the libellant sought to recover the *Appam* upon the claim that holding and detaining the vessel in American waters was in violation of the law of nations and the laws of the United States and of the neutrality of the United States. The answer of the respondents to the amended libel alleged that the *Appam* was brought in as a prize by a prize master, in reliance upon the treaty of 1799 between the United States and Prussia (8 Stat. at L. 162); that by the general principles of international law the prize master was entitled to bring his ship into the neutral port under these circumstances, and that the length of stay was not a matter for judicial determination; and that proceedings had been instituted in a proper prize court of competent jurisdiction in Germany for the condemnation of the *Appam* as a prize of war; and averred that the American court had no jurisdiction.

The libel against the *Appam's* cargo was filed on March 13, 1916, and answer filed on March 31. During the progress of the case, libellant moved the court to sell a part of the cargo as perishable; on motion the court ap-

pointed surveyors, who examined the cargo and reported that the parts so designated as perishable should be sold; upon their report orders of sale were entered, under which such perishable parts were sold, and the proceeds of that sale, amounting to over $600,000, are now in the registry of the court, and the unsold portions of the cargo are now in the custody of the marshal of the Eastern District of Virginia.

The argument in this case has taken wide range, and orally and in printed briefs counsel have discussed many questions which we do not consider necessary to decide in determining the rights involved in these appeals.

From the facts which we have stated, we think the decisive questions resolve themselves into three: First, was the use of an American port, under the circumstances shown, a breach of this nation's neutrality under the principles of international law? Second, was such use of an American port justified by the existing treaties between the German Government and our own? Third, was there jurisdiction and right to condemn the *Appam* and her cargo in a court of admiralty of the United States?

Duties of Neutral.

It is familiar international law that the usual course after the capture of the *Appam* would have been to take her into a German port, where a prize court of that nation might have adjudicated her status and, if it so determined, condemned the vessel as a prize of war. Instead of that, the vessel was neither taken to a German port, nor to the nearest port accessible of a neutral power, but was ordered to, and did, proceed over a distance of more than 3,000 miles, with a view to laying up the captured ship in an American port.

It was not the purpose to bring the vessel here within the privileges universally recognized in international law, i. e., for necessary fuel or provisions, or because of stress of weather or necessity of repairs, and to leave as soon as the cause of such entry was satisfied or removed. The purpose for which the *Appam* was brought to Hampton Roads, and the character of the ship, are emphasized in the order which we have quoted, to take her to an American port and there lay her up, and in a note from his excellency, the German ambassador, to the Secretary of State, in which the right was claimed to keep the vessel in an American port until further notice (Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties, Department of State,

European War No. 3, p. 331), and a further communication from the German ambassador, forwarding a memorandum of a telegram from the German Government concerning the *Appam* (Idem, p. 333), in which it was stated:

"*Appam* is not an auxiliary cruiser, but a prize. Therefore she must be dealt with according to article 19 of Prusso-American treaty of 1799. Article 21 of Hague convention concerning neutrality at sea is not applicable, as this convention was not ratified by England and is therefore not binding in present war according to article 28. The above-mentioned article 19 authorizes a prize ship to remain in American ports as long as she pleases. Neither the ship nor the prize crew can therefore be interned nor can there be question of turning the prize over to English."

In view of these facts, and this attitude of the Imperial Government of Germany, it is manifest that the *Appam* was not brought here in any other character than as a prize, captured at sea by a cruiser of the German Navy, and that the right to keep her here, as shown in the attitude of the German Government and in the answer to the libel, was rested principally upon the Prussian-American treaty of 1799.

The principles of international law recognized by this Government, leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents. If such use were permitted, it would constitute of the ports of a neutral country harbors of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept.

American attitude.

From the beginning of its history this country has been careful to maintain a neutral position between warring Governments, and not to allow the use of its ports in violation of the obligations of neutrality; nor to permit such use beyond the necessities arising from the perils of the seas or the necessities of such vessels as to seaworthiness, provisions, and supplies. Such usage has the sanction of international law (Dana's Note to Wheaton on International Law, 1866, 8th Am. ed., sec. 391), and accords with our own practice (7 Moore's Digest of International Law, 936–938).

A policy of neutrality between warring nations has been maintained from 1793 to this time. In that year President Washington firmly denied the use of our ports to the French minister for the fitting out of privateers

to destroy English commerce. This attitude led to the enactment of the neutrality act of 1794, afterwards embodied in the act of 1818, enacting a code of neutrality, which, among other things, inhibited the fitting out and arming of vessels; the augmenting or increasing of the force of armed vessels; or the setting on foot in our territory of military expeditions; and empowering the President to order foreign vessels of war to depart from our ports, and compelling them so to do when required by the law of nations. (4 Moore, International Arbitrations, 3967 et seq.)

This policy of the American Government was emphasized in its attitude at The Hague Conference of 1907. Article 21 of The Hague treaty provides:

"A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

"It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew."

Article 22 provides:

"A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in article 21."

To these articles, adherence was given by Belgium, France, Austria-Hungary, Germany, the United States, and a number of other nations. They were not ratified by the British Government. This Government refused to adhere to article 23, which provides:

"A neutral power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestrated pending the decision of a prize court. It may have the prize taken to another of its ports.

"If the prize is convoyed by a warship, the prize crew may go on board the convoying ship.

"If the prize is not under convoy, the prize crew are left at liberty."

And in the proclamation of the convention the President recited the resolution of the Senate adhering to it, subject to "the reservation and exclusion of its article 23, and with the understanding that the last clause of article

3 of the said convention implies the duty of a neutral power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction." (36 Stat. L. 2438.)

While this treaty may not be of binding obligation, owing to lack of ratification, it is very persuasive as showing the attitude of the American Government when the question is one of international law; from which it appears clearly that prizes could only be brought into our ports upon general principles recognized in international law, on account of unseaworthiness, stress of weather, or want of fuel or provisions, and we refused to recognize the principle that prizes might enter our ports and roadsteads, whether under convoy or not, to be sequestrated pending the decision of a prize court. From the history of the conference it appears that the reason for the attitude of the American delegates in refusing to accept article 23 was that thereby a neutral might be involved in participation in the war to the extent of giving asylum to a prize which the belligerent might not be able to conduct to a home port. (See Scott, Peace Conferences, 1899–1907, vol. 2, pp. 237 et seq.)

Much stress is laid upon the failure of this Government to proclaim that its ports were not open to the reception of captured prizes, and it is argued that, having failed to interdict the entrance of prizes into our ports, permission to thus enter must be assumed. But, whatever privilege might arise from this circumstance, it would not warrant the attempted use of one of our ports as a place in which to store prizes indefinitely, and certainly not where no means of taking them out are shown except by the augmentation of her crew, which would be a clear violation of established rules of neutrality.

Treaty with Prussia.

As to the contention on behalf of the appellants that article 19 of the treaty of 1799 (8 Stat. L. 172) justifies bringing in and keeping the *Appam* in an American port, in the situation which we have outlined, it appears that, in response to a note from his excellency, the German ambassador, making that contention, the American Secretary of State, considering the treaty, announced a different conclusion (Diplomatic Correspondence with Belligerent Governments, supra, pp. 335 et seq.); and we think this view is justified by a consideration of the terms of the treaty. Article 19 of the treaty of 1799, using the

translation adopted by the American State Department, reads as follows:

"The vessels of war, public and private, of both parties, shall carry [conduire] freely, wheresoever they please, the vessels and effects taken [pris] from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes [prises] be arrested, searched or put under legal process, when they come to and enter the ports of the other party, but may freely be carried [conduites] out again at any time by their captors [le vaisseau preneur] to the places expressed in their commissions, which the commanding officer of such vessel [le dit vaisseau] shall be obliged to show. (But conformably to the treaties existing between the United States and Great Britain, no vessel [vaisseau] that shall have made a prize [prise] upon British subjects shall have a right to shelter in the ports of the United States, but if [il est] forced therein by tempests, or any other danger, or accident of the sea, they [il sera] shall be obliged to depart as soon as possible.)" The provision concerning the treaties between the United States and Great Britain is no longer in force, having been omitted by the treaty of 1828 [8 Stat. L. 378]. See Compilation of Treaties in Force, 1904, pages 641 and 646.

We think an analysis of this article makes manifest that the permission granted is to vessels of war and their prizes, which are not to be arrested, searched, or put under legal process when they come into the ports of the high contracting parties, to the end that they may be freely carried out by their captors to the places expressed in their commissions, which the commanding officer is obliged to show. When the *Appam* came into the American harbor she was not in charge of a vessel of war of the German Empire. She was a merchant vessel, captured on the high seas and sent into the American port with the intention of being kept there indefinitely, and without any means of leaving that port for another, as contemplated in the treaty, and required to be shown in the commission of the vessel bringing in the prize. Certainly such use of a neutral port is very far from that contemplated by a treaty which made provision only for temporary asylum for certain purposes, and can not be held to imply an intention to make of an American port a harbor of refuge for captured prizes of a

belligerent Government. We can not avoid the conclusion that in thus making use of an American port there was a clear breach of the neutral rights of this Government, as recognized under principles of international law governing the obligations of neutrals, and that such use of one of our ports was in no wise sanctioned by the treaty of 1799.

Jurisdiction of court.

It remains to inquire whether there was jurisdiction and authority in an admiralty court of the United States, under these circumstances, to order restoration to an individual owner of the vessel and cargo.

The earliest authority upon this subject in the decisions of this court is found in the case of Glass *v.* The *Betsy*, 3 Dall. 6, decided in 1794, wherein it appeared that the commander of the French privateer, the *Citizen Genet*, captured as a prize on the high seas the sloop *Betsy*, and sent the vessel into Baltimore, where the owners of the sloop and cargo filed a libel in the district court of Maryland, claiming restitution because the vessel belonged to subjects of the King of Sweden, a neutral power, and the cargo was owned jointly by Swedes and Americans. The district court denied jurisdiction, the circuit court affirmed the decree, and an appeal was prosecuted to this court. The unanimous opinion was announced by Mr. Chief Justice Jay, holding that the district courts of the United States possessed the powers of courts of admiralty, whether sitting as an instance or as a prize court, and sustained the jurisdiction of the district court of Maryland, and held that that court was competent to inquire into and decide whether restitution should be made to the complainants conformably to the laws of nations and the treaties and laws of the United States.

The question came again before this court in the case of the *Santissima Trinidad*, decided in 1822, 7 Wheat. 283 In that case it was held that an illegal capture would be invested with the character of a tort, and that the original owners were entitled to restitution when the property was brought within our jurisdiction. The opinion was delivered by Mr. Justice Story, and, after a full discussion of the matter, the court held that such an illegal capture, if brought into the jurisdiction of the courts of the United States, was subject to condemnation and restitution to the owners, and the learned justice said:

"If, indeed, the question were entirely new, it would deserve very grave consideration, whether a claim

founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than a direct intervention of the Government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled that, as between the captors and the captured, the question can never be litigated. It can arise only upon a claim of the neutral sovereign, asserted in his own courts or the courts of the power having cognizance of the capture itself for the purposes of prize. And, by analogy to this course of proceeding, the interposition of our own Government might seem fit to have been required before cognizance of the wrong could be taken by our courts. But the practice from the beginning in this class of causes, a period of nearly 30 years, has been uniformly the other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent for Congress to apply at its pleasure the proper remedy" (p. 349).

"Whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been devested by a violation of our neutrality; and if the goods are landed from the public ship in our ports, by the express permission of our own Government, that does not vary the case, since it involves no pledge that, if illegally captured, they shall be exempted from the ordinary operation of our laws" (p. 354).

In the subsequent cases in this court this doctrine has not been departed from. *L'Invincible*, 1 Wheat. 238, 258, the *Estrella*, 4 Wheat. 298, 308–311; *La Armistad De Rues*, 5 Wheat. 385, 390.

It is insisted that these cases involve illegal captures at sea, or violations of neutral obligation, not arising because of the use of a port by sending in a captured vessel and keeping her there in violation of our rights as a neutral. But we are at a loss to see any difference in principle between such cases and breaches of neutrality of the character here involved in undertaking to make of an American port a depository of captured vessels with a view to keeping them there indefinitely. Nor can we consent to the insistence of counsel for appellant that

the prize court of the German Empire has exclusive jurisdiction to determine the fate of the *Appam* as lawful prize. The vessel was in an American port, and, under our practice, within the jurisdiction and possession of the district court, which had assumed to determine the alleged violation of neutral rights, with power to dispose of the vessel accordingly. The foreign tribunal, under such circumstances, could not oust the jurisdiction of the local court and thereby defeat its judgment. (The *Santissima Trinidad*, supra, p. 355.)

Were the rule otherwise than this court has frequently declared it to be, our ports might be filled, in case of a general war such as is now in progress between the European countries, with captured prizes of one or the other of the belligerents, in utter violation of the principles of neutral obligation which have controlled this country from the beginning.

The violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people.

It follows that the decree in each case must be affirmed.

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[1918]

## THE "HAKAN."

[PRIVY COUNCIL.]

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

October 16, 1917.

[1918] A. C. 148.

Appeal from a judgment of the president of the probate, divorce, and admiralty division (in prize), delivered on July 3, 1916.[55]

The appellants, a Swedish firm carrying on business at Gothenburg, were the owners of the steamship *Hakan*, which was condemned by a judgment of the president (Sir Samuel Evans) on the ground that she was captured while carrying a contraband cargo.

The facts appear from the judgment of their lordships.

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[55] [1916] P. 266.

The learned president held that, apart from the provisions of article 40 of the declaration of London, 1909, the action and the views expressed by the chief maritime States before and since the international naval conference of 1908–9 justified the prize court in accepting as part of the law of nations the rule, stated in article 40, that "a vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo." He considered that where the contraband being carried exceeded the above stated proportion it was not necessary to prove knowledge on the part of the owner or master that the goods in question were destined for the enemy. He held that the owner, or the master on his behalf, must be taken to know the nature and destination of the cargo. Upon the facts of the present case, however, he found that the ship having been chartered at a freight representing 200 per cent per annum upon her capital or insurable value there could be no doubt that the owners knew that she was to be employed in the contraband trade between Scandinavia and German Baltic ports. The *Hakan* accordingly was condemned.

Statement of the case.

October 16. The judgment of their lordships was delivered by Lord Parker, of Waddington. The Swedish steamship *Hakan*, the subject of this appeal, was captured at sea by H. M. S. *Nonsuch* on April 4, 1916, having sailed the same day from Haugesund, in Norway, on a voyage to Lubeck, in Germany, with a cargo of salted herrings. Foodstuffs had as early as August 4, 1914, been declared to be conditional contraband. The writ in the present proceedings claimed condemnation of both ship and cargo, the former on the ground that it was carrying contraband goods and the latter on the ground that it consisted of contraband goods.

It should be observed that the cargo, being on a neutral ship, was, even if it belonged to enemies, exempt from capture unless it consisted of contraband goods (see the declaration of Paris).

The cargo owners did not appear or make any claim in the action, although, according to the usual practice of the prize court, even enemies may appear and be heard in defense of their rights under an international agreement. The question whether the goods were contraband was, however, fully argued by counsel for the owners of the ship, a Swedish firm carrying on business at Gothen-

burg. The president condemned the cargo as contraband. He also condemned the ship for carrying contraband. The owners of the ship have now appealed to His Majesty in council. Under these circumstances the first question to be decided is whether the cargo was rightly condemned as contraband, for if it was not there could be no case against the ship.

Conditional contraband.

In their lordships' opinion, goods which are conditional contraband can be properly condemned whenever the court is of opinion, under all the circumstances brought to its knowledge, that they were probably intended to be applied for warlike purposes, the *Jonge Margaretha*.[56]

Presumption of enemy destination.

The fact alone that the goods in question are on the way to an enemy base of naval or military equipment or supply would justify an inference as to their probable application for warlike purposes. But the character of the place of destination is not the only circumstance from which this inference can be drawn. All the known facts have to be taken into account. The fact that the goods are consigned to the enemy government, and not to a private individual, would be material. The same would be the case if, though the goods are consigned to a private individual, such individual is in substance or in fact the agent or representative of the enemy government.

In the present case Lubeck, the port of destination of the goods, is undoubtedly a port used largely for the importation into Germany of goods from Norway and Sweden; but it does not appear whether it is used exclusively or at all as a base of naval or military equipment. On the other hand, it is quite certain that the persons to whom the goods were consigned at Lubeck were bound forthwith to hand them over to the Central Purchasing Co., of Berlin, a company appointed by the German Government to act under the direction of the imperial chancellor for purposes connected with the control of the food supplies rendered necessary by the war. The proper inference seems to be that the goods in question are in effect goods requisitioned by the Government for the purposes of the war. It may be quite true that their ultimate application, had they escaped capture, would have been to feed civilians, and not the naval or military forces of Germany; but the general scarcity of food in Germany had made the victualing of the civil

[56] 1 C. Rob. 189.

population a war problem. Even if the military or naval forces of Germany are never supplied with salted herrings, their rations of bread or meat may well be increased by reason of the possibility of supplying salted herrings to the civil population. Under these circumstances, the inference is almost irresistible that the goods were intended to be applied for warlike purposes, and, this being so, their lordships are of opinion that the goods were rightly condemned.

The second question their lordships have to determine relates to the condemnation of the ship for carrying the goods in question. It is, of course, quite clear that if article 40 of the declaration of London [57] be applicable, the ship was rightly condemned, inasmuch as the whole cargo was contraband. The declaration of London has, however, no validity as an international agreement. It was, it is true, provided by the order in council of October 29, 1914, that during the present hostilities its provisions should, with certain very material modifications, be adopted and put in force. But the prize court can not, in deciding questions between His Majesty's Government and neutrals, act upon this order except in so far as the declaration of London, as modified by the order, either embodies the international law or contains a waiver in favor of neutrals of the strict rights of the Crown. It is necessary, therefore, to consider the international law with regard to the condemnation of a ship for carrying contraband apart from the declaration of London.

Declaration of London.

It seems quite clear that at one time in our history the mere fact that a neutral ship was carrying contraband was considered to justify its condemnation, but this rule was subsequently modified. Lord Stowell deals with the matter in the *Neutralitet:* [58] "The modern rule of the law of nations is, certainly," he says, "that the ship shall not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise; and it can not be denied, that it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose can not be innocent. The policy of modern times

Stowell's opinion.

[57] Art. 40: "A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo."

[58] (1801) 3 C. Rob. 295.

has, however, introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscable for that act. But this rule is liable to exceptions—where a ship belongs to the owner of the cargo, or where the ship is going on such service, under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one."

It is to be observed that Lord Stowell does not say that the particular cases he refers to are the only exceptions to the modern rule. On the contrary, his actual decision in the *Neutralitet* [59] creates a third exception. It should be observed, too, that in a later part of his judgment he states the reason for the modification of the ancient rule to be the supposition that noxious or doubtful articles might be carried without the personal knowledge of the owner of the ship. He held in the case before him that this ground for the modification of the rule entirely failed, so that the ancient rule applied. The reasoning is sound. For if the ancient rule was modified because of the possible want of knowledge on the part of the shipowner, it is perfectly logical to treat actual knowledge on the part of the shipowner as a good ground for excepting any particular case from the modern rule. Knowledge will also explain the two main exceptions to which Lord Stowell refers. If the shipowner also owns the contraband cargo, he must have this knowledge; and if he sails under a false destination or with false papers, it is quite legitimate to infer this knowledge from his conduct. In his earlier decision in the *Ringende Jacob* [60] Lord Stowell had stated the modern rule to be that the carrying of contraband is attended only with loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances. If by malignant and aggravating circumstances Lord Stowell meant only circumstances from which knowledge of the character of the cargo might be properly inferred, the rule thus stated does not differ from that laid down in the subsequent case of the *Neutralitet*.[59] But the words used have by

[59] 3 C. Rob. 295. [60] (1798) 1 C. Rob. 89.

some writers been taken as indicating that, in Lord Stowell's opinion, besides knowledge of the character of the cargo, there must be on the part of the shipowner some intention or conduct to which the epithets "malignant or aggravating" can be applied in a real as opposed to a rhetorical sense. Any such hypothesis seems, however, to vitiate the reasoning of Lord Stowell in the *Neutralitet*.[59] Sailing under a false destination or false papers may possibly be called malignant or aggravating. There is not only the knowledge of guilt, but an attempt to evade its consequences. But in the case of the shipowner who also owns the contraband on board his ship it is difficult to see where the malignancy or aggravation lies, if it be not in the knowledge of the character of the goods on board. If it be malignant or aggravating on the part of the owner of the goods to consign them to the enemy, it must be equally malignant and aggravating on the part of the shipowner knowingly to aid in the transaction.

Nevertheless, it was this construction of Lord Stowell's words in the *Ringende Jacob* [61] rather than the reasoning on which his decision in the *Neutralitet* [62] case was based that was adopted by the Supreme Court of the United States in the case of the *Bermuda*.[63] In that case Chase, C. J., in delivering the opinion of the court, says as to the relaxation of the ancient rule: "It is founded on the presumption that the contraband shipment was made without the consent of the owner given in fraud of belligerent rights, or, at least, without intent on his part to take hostile part against the country of the captors; and it must be recognized and enforced in all cases where that presumtion is not repelled by proof. The rule, however, requires good faith on the part of the neutral, and does not protect the ship where good faith is wanting. * * * Mere consent to transportation of contraband will not always or usually be taken to be a violation of good faith. There must be circumstances of aggravation. The nature of the contraband articles and their importance to the belligerent, and the general features of the transaction, must be taken into consideration in determining whether the neutral owner intended or did not intend, by consenting to the transportation, to mix in the war."

Chase's opinion.

[61] 1 C. Rob. 89. [62] 3 C. Rob. 295. [63] (1865) 3 Wall. 514, 555.

Passing from the English and American decisions to the views which were at the commencement of the present hostilities entertained by the prize courts or jurists of other nations, we find what at first sight appears to be considerable divergence of opinion. If, however, the true principle be that knowledge of the character of the cargo is a sufficient ground for depriving a shipowner of the benefit of the modern rule, this divergence is more apparent than real. It reduces itself to a difference of opinion as to the circumstances under which the knowledge may be inferred, and if it be remembered that knowledge on the part of the shipowner of the character of the cargo must be largely a matter of inference from a great variety of circumstances, such difference of opinion is readily intelligible.

Dutch view. Referring, for example, to the view entertained in Holland, their lordships find that, although the ship is prima facie confiscable if an important part of the cargo be contraband, proof that the master or the charterers could not have known the real nature of the cargo will secure the ship's release. In other words, the proportion of the contraband to the whole cargo raises a presumption of knowledge which may be rebutted.

Italian view. Again, according to the views held in Italy, the ship carrying contraband is liable to confiscation only where the owner was aware that his vessel was intended to be used for the carrying of contraband. Here knowledge is made the determining factor, the manner in which knowledge is to be proved or inferred being left to the general law.

German view. Again, according to the views entertained in Germany, a ship carrying contraband can only be confiscated if the owner or the charterer of the whole ship or the master knew or ought to have known that there was contraband on board, and if that contraband formed more than a quarter of the cargo. Here also knowledge is made the determining factor, though there is a concession to the neutral if the proportion of the contraband to the whole cargo be sufficiently small.

French view. Once more, in France the test of the right to confiscate is whether or not the contraband is three-fourths in value of the whole cargo. This view may be looked on as defining the circumstances in which an irrebuttable inference of knowledge arises. The views entertained in Russia and Japan are similarly explicable. In their lordships' opinion the principle underlying all these

views is the same. There can be no confiscation of the ship without knowledge on the part of the owner, or possibly of the charterer or master, of the nature of the cargo, but in some cases the inference as to knowledge arising from the extent to which the cargo is contraband can not be rebutted, while in others it can, and in some cases, even where there is the requisite knowledge, the contraband must bear a minimum proportion to the whole cargo.

It follows that the views entertained by foreign nations point to knowledge of the character of the goods being alone sufficient for condemnation of a vessel for carrying contraband; in other words, they support the principle to be derived from the reasoning in the *Neutralitet*[64] rather than the principle which has been deduced from the dictum in the *Ringende Jacob*[65] and developed in the *Bermuda*.[66] It should be observed that both Westlake and Hall agree that knowledge is alone sufficient to justify confiscation. (See Westlake, International Law (War), 2d ed., p. 291; Hall, International Law, 6th ed., p. 666.)

Their lordships consider that in this state of the authorities they ought to hold that knowledge of the character of the goods on the part of the owner of the ship is sufficient to justify the condemnation of the ship—at any rate, where the goods in question constitute a substantial part of the whole cargo.

Facts of case.

In the light of what has been said as to the rule of international law their lordships will now proceed to consider the special facts of this case. The owners of the ship are a Swedish firm carrying on business at Gothenburg. On January 8, 1916, they chartered the ship to a German firm of fish dealers for a period of six weeks from the time when the vessel was placed at charterers' disposal, with power for the charterers to prolong this period up to May 16, 1916. The voyages undertaken by the charterers were to be from Scandinavian to German Baltic ports. It must have been quite evident to the owners that the ship would be used for the importation of fish into Germany. They must also have known that foodstuffs were conditional contraband. It is almost inconceivable that they did not also know of the food

[64] 3 C. Rob. 295. [65] 1 C. Rob. 89. [66] 3 Wall. 514.

difficulties in Germany and of the manner in which the German Government had in effect requisitioned salted herrings to meet the exigencies of the war. They had an opportunity in the court below of establishing their want of knowledge if it existed, but they did not attempt to do so. The inference that they did in fact know that the vessel would be used for the purpose for which it was used is irresistible. If knowledge of the character of the goods be the true criterion as to confiscability, the vessel was rightly condemned.

Even on the hypothesis that something beyond mere knowledge of the character of the cargo is required, something which may be called "malignant or aggravating" within the principles of the *Ringende Jacob*[67] or the *Bermuda*[68] decisions, that something clearly exists in the present case. A shipowner who lets his ship on time charter to an enemy dealer in conditional contraband for the purposes of his trade at a time when the conditional contraband is vitally necessary to and has been requisitioned by the enemy government for the purpose of the war is, in their lordships' opinion, deliberately "taking hostile part against the country of the captors" and "mixing in the war" within the meaning of those expressions as used by Chase C. J. in the *Bermuda*.[68]

Decision.

In their lordships' opinion, the appeal fails and should be dismissed with costs.

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**THE "BONNA."**

ADMIRALTY.

(In Prize.)

February 14, 15, 19, 1918.

[1918] P. 123.

In this case, which governed a number of others, the procurator general, on behalf of the Crown, claimed the condemnation of 416 tons of coconut oil seized at Bristol on August 27, 1916, ex the Norwegian steamship *Bonna*.

The claimants, the Nya Margarin A/B. Svea, of Kalmar, Sweden, claimed the release of the oil on the ground that it had been bought by them for the purpose of the manufacture, in their own factory, of margarine for sale and consumption in Sweden.

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[67] 1 C. Rob. 89. [68] 3 Wall. 514.

The case is reported on the alternative question argued on behalf of the Crown that, assuming the claimants established that the oil was destined solely for the Swedish factory, it should be deemed to have an enemy destination on the ground that it helped to form part of a reservoir of edible fats part of which went to Germany, or that the margarine manufactured from it would, to the knowledge of the claimants, be consumed in Sweden in substitution for butter exported to Germany. On this latter point it appeared from an affidavit by the controller of the war trade statistical department that before the war Sweden exported about 76 per cent of her surplus butter to the United Kingdom and Denmark, and that the quantity exported to Germany was 2.3 per cent. After the outbreak of war the export to the United Kingdom, and in a lesser degree to Denmark, decreased, until by June, 1916, it had dwindled to less than 0.4 per cent, while Germany was receiving 98 per cent of the total export. During the second half of 1916 large quantities of edible fats and oils suitable for margarine manufacture were seized as prize, with the result that, whereas in July, 1916, 1,716 tons of butter were exported, 1,701 of which went to Germany, in December, 1916, less than 1 ton was exported, and from January to October, 1917, only 1½ tons were exported to Germany.

February 19. The President (Sir Samuel Evans) read the following judgment: This claim relates to 416 tons of coconut oil shipped on the Norwegian steamship *Bonna*, and seized on August 27, 1916.

Statement of the case.

The claimants are a Swedish company of margarine manufacturers and dealers carrying on business at Kalmar. The company was formed before the war, but its business increased largely after the war. Coconut oil was declared conditional contraband by an order in council of October 14, 1915.

The case for the claimants was that the oil was their property, and was bought for the purpose of the manufacture of margarine in their own factory for sale and consumption in Sweden, and as such was not subject to capture or condemnation.

It was contended for the Crown that the claimants had failed to discharge the onus which, in the circumstances, rested upon them, to establish that the destination of the oil was neutral; and, further, that the oil was subject to condemnation on the ground either (1) that it, and

Neutral destination.

the margarine for the manufacture of which it was acquired, should, in the circumstances, be deemed to have an enemy destination; or (2) that such margarine, when manufactured, would to the knowledge of the claimants be consumed in Sweden in subsitution for Swedish butter to be supplied to Germany.

Of the total of 416 tons, 111 tons were shipped at Batavia and Sourabaya, in the Dutch East Indies, by G. H. Slot & Co. as consignors to Auguste Pellerin, Fils & Co. as consignees at Christiania; and 305 tons at Sourabaya by Burns, Philps & Co. as consignors to Anders Mellgren as consignee at Gothenburg. All the consignments were intended for the claimant company, which had bought the former lot through A. B. Nielsen & Co., of Christiania, and the latter through one Ole Boe, of the same city. The goods were sold and bought under f. o. b. contracts.

It was said that the first-named consignees, Auguste Pellerin, Fils & Co., were inserted in some of the bills of lading through a mistake of the shippers, which was not discovered till after the vessel sailed. While she was on her voyage the shippers caused a cablegram to be transmitted to her master asking him to alter the manifest by entering the name of Anders Mellgren as the consignee. This he did not do; but he pinned the cablegram to the manifest. Whether it was intended that he should alter the bills of lading or not is in doubt.

Anders Mellgren was the French consul at Gothenburg. he had no control over, or beneficial interest in, the goods. His name was used as consignee with his assent, accorded for a small commission. The object of this was, according to the claimants' story, to facilitate the passage of the goods into Sweden by satisfying any British cruiser or examining vessel that the destination of the goods was neutral, and so to avoid the diverting of the vessel and her cargo to a British port for search and examination.

How the alleged mistake of inserting Auguste Pellerin, Fils & Co. in some of the bills of lading arose has not been shown as clearly as could be wished. But however that occurred, and whatever the object of consigning the goods to Mellgren may have been, the result was that the ship's papers did not show who were the real consignees for whom the goods were destined. This clearly placed upon the claimants the burden of proving that the goods

did not have an enemy destination. Other matters arising upon the documents also required explanation; but I refrain from entering upon them, as that may be unnecessary in view of the decision to be pronounced upon the claim to the release of the goods.

As to the ownership and destination of the goods, having regard to all the circumstances (which need not be detailed), I have come to the conclusion that the oil was the property of the claimants, and was bought, and intended to be used, by them in their own factory in the manufacture of margarine; and that such margarine was intended for consumption in Sweden.

Apart from these questions of fact, counsel for the Crown rested their case upon a broader ground. Statistics were given in evidence to show the increase of the importation into Sweden of raw materials for margarine and of the production and sale of margarine, and to show the simultaneous increase of the export of butter from Sweden to Germany. They were interesting, and beyond doubt they proved that the more margarine was made for the Swedes the more butter was supplied by them to the Germans; and that when by reason of the naval activity of this country the imports for margarine production became diminished, the Swedish butter was kept for consumption within Sweden itself and ceased to be sent to the enemy.

Raw materials.

Upon these facts counsel for the Crown formulated and founded their legal proposition. That proposition may be translated in practical terms, in relation to the facts of this case, perhaps more usefully than if it were stated in abstract language. So translated it may be stated thus: "Margarine and butter are of the same class of food, one being used as a substitute for, or even as an equivalent of, the other. Margarine was produced in Sweden—by the claimants among others—with the result that, to the knowledge of the manufacturers, the butter of the country was being sent to Germany, where it would pass under the control of the Government. There was, so to speak, one reservoir of the edible fats, butter and margerine. As one part of the contents—the butter—was conveyed away for consumption in Germany, the other part—margarine—was sent in to take its place for consumption in Sweden. If the one part could be captured as conditional contraband, the other part was subject to capture also; and not only that

Conditional contraband.

part when completely manufactured, but the raw materials for it as well."

No authority was, or could be, adduced for the proposition formulated in such an argument; but it was contended, nevertheless, that it logically followed principles recognized by international law.

Continuous voyage.

Before pronouncing the decision of the court I think it right to say that, if it were established that raw materials were imported by a neutral for the manufacture of margarine with an intention to supply the enemy with the manufactured article, I should be prepared to hold that the doctrine of continous voyage applied so as to make such raw materials subject to condemnation as conditional contraband with an enemy destination.

I should go even further and hold that, if it were shown that in a neutral country particular manufacturers of margarine were acting in combination with particular producers or vendors of butter, and that the intention and object of their combination was to produce the margarine in order to send the butter to the enemy, the same doctrine would be applicable with the same results.

But there is a long space between those two supposed cases and the one now before the court; and this space, in my view, can not be spanned by the application of the accepted principles of the law of nations.

Conversion of raw materials.

I do not consider that it would be in accordance with international law to hold that raw materials on their way to citizens of a neutral country to be converted into a manufactured article for consumption in that country were subject to condemnation on the ground that the consequence might, or even would, necessarily be that another article of a like kind, and adapted for a like use, would be exported by other citizens of the neutral country to the enemy.

Decision.

I therefore allow the claim, and order that the goods seized, or the proceeds if sold, be released to the claimants.

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## THE "STIGSTAD."

[PRIVY COUNCIL.]

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

December 16, 1918.

[1918] A. C. 279.

Appeal from a judgment of the president of the admiralty division (in prize).[69]

[69] [1916 ]P. 123.

The appellants, managers of the Norwegian steamship *Stigstad*, claimed in the prize court for freight, damages for detention of the ship, and expenses. The ship had been required to discharge her cargo at Middlesbrough, under the provision of an order in council of March 11, 1915. The facts appear from the judgment of their lordships.

The president, Sir Samuel Evans, upon the claim of the Norwegian cargo owners coming before the court, had ordered that the appellants should receive out of the proceeds of the cargo a sum for freight to be agreed, or in default of agreement to be determined by the registrar in accordance with the principles laid down in the *Juno*.[70] The president, by a judgment delivered on April 14, held that the order in council was valid, and that the appellants were not entitled to the further compensation which they claimed.

Statement of the case.

The material terms of the order in council appear from the report of the proceedings before the president.

December 16. The judgment of their lordships was delivered by Lord Sumner. The appellants in this case were claimants below. They are a Norwegian company which manages the steamship *Stigstad* for her owners, the Klaveness Dampskibsaktieselskab, a Norwegian corporation. While on a voyage, begun on April 10, 1915, from Kirkenes, Sydvaranger, in Norway, to Rotterdam with iron-ore briquettes, the property of neutrals, she was stopped in latitude 56° 9′ N. and longitude 6° 6′ E. about a day's sail from Rotterdam by H. M. S. *Inconstant*, and was ordered to Leith and thence to Middlesbrough to discharge. Their claim was for "(1) freight, (2) detention, and (3) expenses consequent upon" this seizure and the discharge at Middlebrough afterwards. The detention was measured by the number of days which elapsed between the expected date of completing discharge at Rotterdam and the actual date of completing discharge at Middlesbrough, calculated at the chartered rate for detention, viz, 130l. per day; and as to the expenses, while willing to treat port dues and expenses at Middlesbrough as the equivalent of those which would have been incurred at Rotterdam, the owners claimed some port dues and expenses at Leith and a few guineas for special agency expenses at Middlesbrough. Eventually

[70] [1916] P. 169.

the cargo was sold by consent, and a sum, the amount of which was agreed between the parties, was ordered to be paid out of the proceeds to the claimants for freight; but the president, Sir Samuel Evans, dismissed the claims for detention and for the special expenses. It is against his decree that the claimants have now appealed. They have admitted throughout that, in fact, the cargo of iron-ore briquettes was to be discharged into Rhine barges at Rotterdam in order to be conveyed into Germany.

The cargo was shipped by the Aktieselskabet Sydvaranger of Kirkenes, and was to be delivered to V. V. W. Van Drich, Stoomboot en Transport Ondernemingen, both neutrals, but it is contended that section 3 of the order in council, dated March 11, 1915, warranted interference with the ship and her cargo by His Majesty's navy on the voyage to Rotterdam. The president's directions as to freight were that "the fair freight must be paid to them, having regard to the work which they did," the principle which he had laid down in the *Juno* [70] being, in his opinon, applicable. The claim for detention is, in truth, a claim for damages for interfering with the completion of the chartered voyage, for it is admitted that delivery was taken at Middlesbrough with reasonable dispatch. That part of the claim which relates to the ship's being ordered to call at Leith and the claim for expenses incurred there are claims for damages for putting in force the above-named order in council, for it is not suggested that the order to call at Leith, and thence to proceed to Middlesbrough, was in itself an unreasonable way of exercising the powers given by the order. The small claim for fees at Middlesbrough seems to relate to an outlay incident to the earning of the freight which has been paid, and was covered by it; but, if it is anything else, it also is a claim for damages of the same kind. "Damages" is the word used by the president in his judgment; and, although it was avoided and deprecated in argument before their lordships, there can be no doubt that it, and no other, is the right word to describe the nature of the claims under appeal.

Order in council March 11, 1915.

Damages.

It is impossible to find in the express words of the order any language which directs that such damages should be allowed, nor are the principles applicable which have been followed in the *Anna Catharina* [71] and elsewhere, as

[70] [1916] P. 169.

[71] 6 C. Rob. 10.

to allowance of freight and expenses to neutral ships, whatever be the exact scope and application of those cases. Again, with the fullest recognition of the rights of neutral ships, it is impossible to say that owners of such ships can claim damages from a belligerent for putting into force such an order in council as that of March 11, 1915, if the order be valid. The neutral exercising his trading rights on the high seas and the belligerent exercising on the high seas rights given him by order in council or equivalent procedure, are each in the enjoyment and exercise of equal rights; and, without an express provision in the order to that effect, the belligerent does not exercise his rights subject to any overriding right in the neutral. The claimants' real contention is, and is only, that the order in council is contrary to international law, and is invalid.

Neutral trading rights.

Upon this subject two passages in the *Zamora* [72] are in point. The first is at page 95, and relates to Sir William Scott's decision in the *Fox*.[73] "The decision proceeded upon the principle that, where there is just cause for retaliation, neutrals may by the law of nations be required to submit to inconvenience from the act of a belligerent power greater in degree than would be justified had no just cause for retaliation arisen, a principle which had been already laid down in the *Lucy*." [74]

Reprisals.

Further, at page 98, are the words "An order authorizing reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case."

It is true that in the *Zamora* [75] the validity of a retaliatory order in council was not directly in question, but these passages were carefully considered and advisedly introduced as cogent illustrations of the principle, which was the matter then in hand. Without ascribing to them the binding force of a prior decision on the same

[72] [1916] 2 A. C. 77, 95, 98. [73] Edw. 311. [74] (1809) Edw. 122. [75] [1916] 2 A. C. 77.

point, their lordships must attach to them the greatest weight and, before thinking it right to depart from them, or even necessary to criticize them at any great length, they would at least expect it to be shown either that there are authoritative decisions to the contrary, or that they conflict with general principles of prize law or with the rules of common right in international affairs.

What is here in question is not the right of the belligerent to retaliate upon his enemy the same measure as has been meted out to him, or the propriety of justifying in one belligerent some departure from the regular rules of war on the ground of necessity arising from prior departure on the part of the other, but it is the claim of neutrals to be saved harmless under such circumstances from inconvenience or damage thereout arising. If the statement above quoted from the *Zamora* be correct, the recitals in the order in council sufficiently establish the existence of such breaches of law on the part of the German Government as justify retaliatory measures on the part of His Majesty, and, if so, the only question open to the neutral claimant for the purpose of invalidating the order is whether or not it subjects neutrals to more inconvenience or prejudice than is reasonably necessary under the circumstances.

Their lordships think that such a rule is sound, and indeed inevitable. From the nature of the case the party who knows best whether or not there has been misconduct calling such a principle into operation, is a party who is not before the court, namely, the enemy himself. The neutral claimant can hardly have much information about it, and certainly can not be expected to prove or disprove it. His Majesty's Government, also well aware of the facts, has already, by the fact as well as by the recitals of the order in council, solemnly declared the substance and effect of that knowledge, and an independent inquiry into the course of contemporary events, both naval and military, is one which a court of prize is but ill-qualified to undertake for itself. Still less would it be proper for such a court to inquire into the reasons of policy, military or other, which have been the cause and are to be the justification for resorting to retaliation for that misconduct. Its function is, in protection of the rights of neutrals, to weigh on a proper occasion the measures of retaliation which have been adopted in fact, and to inquire whether they are in their nature or extent

Justification for retaliatory measures.

other than commensurate with the prior wrong done, and whether they inflict on neutrals, when they are looked at as a whole, inconvenience greater than is reasonable under all the circumstances. It follows that a court of prize, while bound to ascertain, from the terms of the order itself, the origin and the occasion of the relatiatory measures for the purpose of weighing those measures with justice as they affect neutrals, nevertheless ought not to question, still less to dispute, that the warrant for passing the order, which is set out in its recitals, has in truth arisen in the manner therein stated. Although the scope of this inquiry is thus limited in law, in fact their lordships can not be blind to what is notorious to all the world and is in the recollection of all men, the outrage, namely, committed by the enemy, upon law, humanity, and the rights, alike of belligerents and neutrals, which led to, and indeed compelled, the adoption of some such policy as is embodied in this order in council. In considering whether more inconvenience is inflicted upon neutrals than the circumstances involve, the frequency and the enormity of the original wrongs are alike material, for the more gross and universal those wrongs are, the more are all nations concerned in their repression, and bound for their part to submit to such sacrifices as that repression involves. It is right to recall that, as neutral commerce suffered and was doomed to suffer gross prejudice from the illegal policy proclaimed and acted on by the German Government, so it profited by, and obtained relief from, retaliatory measures, if effective to restrain, to punish and to bring to an end such injurious conduct. Neutrals, whose principles or policy lead them to refrain from punitory or repressive action of their own, may well be called on to bear a passive part in the necessary suppression of courses which are fatal to the freedom of all who use the seas.

The argument principally urged at the bar ignored these considerations, and assumed an absolute right in neutral trade to proceed without interference or restriction, unless by the application of the rules heretofore established as to contraband traffic, unneutral service, and blockade. The assumption was that a neutral, too pacific or too impotent to resent the aggressions and lawlessness of one belligerent, can require the other to refrain from his most effective, or his only, defense against it, by the assertion of an absolute inviolability for his own

neutral trade, which would thereby become engaged in a passive complicity with the original offender. For this contention no authority at all was forthcoming. Reference was made to the orders in council of 1806 to 1812, which were framed by way of retaliation for the Berlin and Milan decrees. There had been much discussion of these celebrated instruments on one side or the other, though singularly little in decided cases or in treatises of repute; and, according to their nationality or their partisanship, writers have denounced the one policy or the other, or have asserted their own superiority by an impartial censure of both. The present order, however, does not involve for its justification a defense of the very terms of those orders in council. It must be judged on its merits and, if the principle is advanced against it that such retaliation is wrong in kind, no foundation in authority has been found on which to rest it. Nor is the principle itself sound. The seas are the highway of all, and it is incidental to the very nature of maritime war that neutrals, in using that highway, may suffer inconvenience from the exercise of their concurrent rights by those who have to wage war upon it. Of this fundamental fact the right of blockade is only an example. It is true that contraband, blockade, and unneutral service are branches of international law which have their own history, their own illustrations, and their own development. Their growth has been unsystematic, and the assertion of right under these different heads has not been closely connected or simultaneous. Nevertheless, it would be illogical to regard them as being in themselves disconnected topics or as being the subject of rights and liabilities which have no common connection. They may also be treated, as in fact they are, as illustrations of the broad rule that belligerency and neutrality are states so related to one another that the latter must accept some abatement of the full benefits of peace in order that the former may not be thwarted in war in the assertion and defense of what is the most precious of all the rights of nations, the right to security and independence. The categories of such cases are not closed. To deny to the belligerent under the head of retaliation any right to interfere with the trade of neutrals beyond that which, quite apart from circumstances which warrant retaliation, he enjoys already under the heads of contraband, blockade, and unneutral service, would be to take away with

Orders in council, 1806–1812.

Blockade.

one hand what has formally been conceded with the other. As between belligerents acts of retaliation are either the return of blow for blow in the course of combat, or are questions of the laws of war not immediately falling under the cognizance of a court of prize. Little of this subject is left to prize law beyond its effect on neutrals and on the rights of belligerents against neutrals, and to say that retaliation is invalid as against neutrals, except within the old limits of blockade, contraband, and unneutral service, is to reduce retaliation to a mere simulacrum, the title of an admitted right without practical application or effect.

Apart from the *Zamora*, the decided cases on this subject, if not many, are at least not ambiguous. Of the *Leonora* [76], decided on the later order in council, their lordships say nothing now, since they are informed that it is under appeal to their lordships' board, and they desire on the present occasion to say no more, which might affect the determination of that case, than is indispensable to the disposal of the present one.

Scott's decisions.

Sir William Scott's decisions on the retaliatory orders in council were many, and many of them were affirmed on appeal. He repeatedly, and in reasoned terms, declared the nature of the right of retaliation and its entire consistency with the principles of international law. Since then discussion has turned on the measures by which effect was then given to that right, not on the foundation of the principle itself, and their lordships regard it as being now too firmly established to be open to doubt.

Excessive hardship on neutral commerce.

Turning to the question which was little argued, if at all, though it is the real question in the case, whether the order in council of March 11, 1915, inflicts hardship excessive either in kind or in degree upon neutral commerce, their lordships think that no such hardship was shown. It might well be said that neutral commerce under this order is treated with all practicable tenderness, but it is enough to negative the contention that there is avoidable hardship. Of the later order in council they say nothing now. If the neutral shipowner is paid a proper price for the service rendered by his ship, and the neutral cargo-owner a proper price according to the value of his goods, substantial cause of complaint can only arise if considerations are put forward

[76] [1918] P. 182.

which go beyond the ordinary motives of commerce and partake of a political character, from a desire either to embarrass the one belligerent or to support the other. In the present case the agreement of the parties as to the amount to be allowed for freight disposes of all question as to the claimants' rights to compensation for mere inconvenience caused by enforcing the order in council. Presumably that sum took into account the actual course and duration of the voyage and constituted a proper recompense alike for carrying and for discharging the cargo under the actual circumstances of that service.

Charter party.

The further claims are in the nature of claims for damages for unlawful interference with the performance of the Rotterdam charter party. They can be maintained only by supposing that a wrong was done to the claimants, because they were prevented from performing it, for in their nature these claims assume that the shipowners are to be put in the same position as if they had completed the voyage under that contract, and are not merely to be remunerated on proper terms for the performance of the voyage, which was in fact accomplished. In other words, they are a claim for damages, as for wrong done by the mere fact of putting in force the order in council.

Decision.

Such a claim can not be sustained. Their lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

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### THE "LEONORA."

[PRIVY COUNCIL.]

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

July 31, 1919.

[1919] A. C. 974.

Appeals from decrees of the admiralty division (in prize) dated April 18, 1918.[77]

The appellants in the two appeals were respectively the owners of the Dutch steamship *Leonora* and the owners of a cargo of coal which she was carrying when captured. The ship and cargo were seized and condemned under an order in council of February 16, 1917, known as the second retaliatory order. The facts appear from the judgment of their lordships. The order

[77] [1918] P. 182.

in council is fully set out in the report of the hearing before the president.

Statement of the case.

July 31. The judgment of their lordships was delivered by Lord Sumner. The *Leonora*, a Dutch steamship bound from Rotterdam to Stockholm direct, was stopped on August 16, 1917, by His Majesty's tropedo boat *F77*, outside territorial waters, and shortly after passing Ymuiden. She was taken into Harwich. Her cargo, which was neutral owned, consisted of coal, the produce of collieries in Belgium. It was not intended that she should call at any British or allied port, nor had any application been made on her behalf for the appointment of a British port for the examination of her cargo. Both ship and cargo were condemned, pursuant to the order in council, dated February 16, 1917, and both the shipowners and the cargo owners appeal.

Enemy origin.

Their lordships are satisfied that the cargo was "of enemy origin" within the meaning of paragraphs 2 and 3 of that order. The term had been used in the order of March 11, 1915, paragraph 4, and, owing to doubts as to the effect of the word "enemy" therein, a further order was made on January 10, 1917, which applied the term "enemy origin," as used in that paragraph, to goods "originating in any enemy country." In the present case, the question is one of the interpretation of the third order, that of February 16, 1917, which, beyond saying that it is supplemental to the above-mentioned orders, makes no further express reference to them, but from the recital as to the recent proceedings of the German Government, it is plain that the order of 1917 dealt with a wider mischief and was intended to have a wider scope than the previous order. It is therefore necessary to have regard to the system of exploitation then in force in Belgium for the advancement of German interests, in order to appreciate the full effect of the words "enemy origin." It is not necessary to inquire whether, within the terms of the order, a Belgian origin could, as such, be regarded as an "enemy" origin for this purpose, or what the effect, if any, of the German occupation might be on the view to be taken of the nationality of persons resident in Belgium. The collieries from which this coal came were included in the German "Kohlenzentrale," a system by which the coal production of Belgium was strictly controlled and was compulsorily manipulated, with the object of supporting German exchange and assisting

Orders in council, Mar. 11, 1915, Feb. 16, 1917.

German commercial transactions.

German commercial transactions with neutral countries, especially Holland and Sweden. In particular, the export of Belgian coal to Sweden was encouraged, because it assisted to procure a reciprocal importation of ore from Sweden. The actual sale of this very cargo was arranged in Cologne by an official of the Kohlenzentrale in his own name, nor is it proved that he was, in fact, selling on behalf of some undisclosed principal, either in Belgium or elsewhere. Payment for it was made by lodging Swedish kroner in a Stockholm bank to the credit of the Kohlenzentrale. It is stated in the German regulations that "the amount realized by the sale will be paid to the vendors," whoever they may have been. Perhaps this may have been so; for if no money at all reached the colliery, presumably the getting of coal there would come to an end; but whatever crumbs may have been allowed to fall from the masters' table, the fact is clear that these coals were won, sold, and shipped as part of a German Government trade, carried on for the benefit of the enemy in prosecuting the war. To deny to them the term "of enemy origin," as used in this order, would be pedantic. The order is devised to give effect to a scheme of retaliation, which will compel the enemy to desist from outrageous conduct, by crippling or preventing trade in goods which in a broad, but very real, sense he made his own. It does not employ this expression "of enemy origin" as a mere geographical term, nor as merely descriptive of the nationality of the original owners of the coal, who were involuntary, and probably reluctant, victims of the German system. Upon this point the view of their lordships is that the learned president's conclusion was right.

The appellants' main case was that the order in council was invalid, principally on the ground that it pressed so hardly on neutral merchants and interfered so much with their rights that, as against them, it could not be held to fall within such right of reprisal as a belligerent enjoys under the law of nations. A subordinate part of their argument was that in its application to the *Leonora* the order was bad, because no British port had been appointed at which she would call for the examination of her cargo. In so far as this circumstance forms part of the general hardship to neutrals it will be dealt with presently. As a separate point their lordships think that it fails, for the language of the order in council does not

Reprisals.

Hardship to neutrals.

constitute the appointment of some British port for examination of the cargoes, either of this ship or of ships in general, a condition precedent to the application of the order. The proviso relieving vessels which call at an appointed port operates not as a prescription of the circumstances under which alone such application is admissible, but merely as a mode of mitigating the stringency of the order. The evidence discloses no reason why the appointment of a convenient port should not have been applied for to facilitate the *Leonora's* voyage, and a difficulty can not be relied on as a circumstance of excessive inconvenience to neutrals, which it was in their power to remove by such simple means. Port of examination.

Upon the validity of the order in council itself the appellants advanced a twofold argument. The major proposition was that the order purported to create an offense, namely, failure to call at a British or allied port, which is unknown to the law of nations, and to impose punishment upon neutrals for committing it; in both respects it was said that the order is incompetent. The minor proposition was that the belligerent's right to take measures of retaliation, such as it is, must be limited, as against neutrals, by the condition that the exercise of that right must not inflict on neutrals an undue or disproportionate degree of inconvenience. In the present case various circumstances of inconvenience were relied on, notably the perils of crossing the North Sea to a British port of call and the fact that no particular port of call in Great Britain had been appointed for the vessel to proceed to.

In the *Stigstad* [78] their lordships had occasion to consider and to decide some at least of the principles upon which the exercise of the right of retaliation rests, and by those principles they are bound. In the present case, nevertheless, they have had the advantage of counsel's full reexamination of the whole subject, and full citation of the authorities, and of a judgment by the president in the prize court, which is itself a monument of research. The case furthermore has been presented under circumstances as favorable to neutrals as possible, for the difference in the stringency of the two orders in council, that of 1915 and that of 1917, is marked, since in the

[78] [1919] A. C. 279.

case of the later order the consequences of disregarding it have been increased in gravity and the burden imposed on neutrals has become more weighty. If policy or sympathy can be invoked in any case they could be and were invoked here.

Their lordships, however, after a careful review of their opinion in the *Stigstad*, think that they have neither ground to modify, still less to doubt, that opinion, even if it were open to them to do so, nor is there any occasion in the present case to embark on a general restatement of the doctrine or a minute reexamination of the authorities.

Belligerent rights.

There are certain rights, which a belligerent enjoys by the law of nations in virtue of belligerency, which may be enforced even against neutral subjects and to the prejudice of their perfect freedom of action, and this because without those rights maritime war would be frustrated and the appeal to the arbitrament of arms be made of none effect. Such for example are the rights of visit and search, the right of blockade and the right of preventing traffic in contraband of war. In some cases a part of the mode in which the right is exercised consists of some solemn act of proclamation on the part of the belligerent, by which notice is given to all the world of the enforcement of these rights and of the limits set to their exercise. Such is the proclamation of a blockade and the notification of a list of contraband. In these cases the belligerent sovereign does not create a new offense motu proprio; he does not, so to speak, legislate or create a new rule of law; he elects to exercise his legal rights and puts them into execution in accordance with the prescriptions of the existing law. Nor again in such cases does the retaliating

Office of a prize court.

belligerent invest a court of prize with a new jurisdiction or make the court his mandatory to punish a new offense. The office of a court of prize is to provide a formal and regular sanction for the law of nations applicable to maritime warfare, both between belligerent and belligerent and between belligerent and neutral. Whether the law in question is brought into operation by the act of both belligerents in resorting to war, as is the case with the rules of international law as to hostilities in general, or by the assertion of a particular right arising out of a particular provocation in the course of the war on the part of one of them, it is equally the duty of a court of prize, by virtue of its general jurisdiction as such, to provide for

the regular enforcement of that right, when lawfully asserted before it, and not to leave that enforcement to the mere jurisdiction of the sword. Disregard of a valid measure of retaliation is as against neutrals just as justiciable in a court of prize as is breach of blockade or the carriage of contraband of war. The jurisdiction of a court of prize is at least as essential in the neutral's interest as in the interest of the belligerent, and if the court is to have power to release in the interest of the one, it must also have inherent power to condemn in justice to the other. Capture and condemnation are the prescriptive and established modes by which the law of nations as applicable to maritime warfare is enforced. Statutes and international conventions may invest the court with other powers or prescribe other modes of enforcing the law, and the belligerent sovereign may in the appropriate form waive part of his rights and disclaim condemnation in favor of some milder sanction, such as detention. In the terms of the present order, which says that a vessel (par.2) shall be "liable to capture and condemnation" and that goods (par.3 ) shall be "liable to condemnation," some argument has been found for the appellants' main proposition, that the order in council creates an offense and attaches this penalty, but their lordships do not accept this view. The order declares, by way of warning and for the sake of completeness, the consequences which may follow from disregard of it; but, if the occasion has given rise to the right to retaliate, if the belligerent has validly availed himself of the occasion, and if the vessel has been encountered at sea under the circumstances mentioned, the right and duty to bring the ship and cargo before a court of prize, as for a justiciable offense against the right of the belligerent, has arisen thereupon, and the jurisdiction to condemn is that which is inherent in the court. That a rebuttable presumption is to be deemed to arise under paragraph 1, and that a saving proviso is added to paragraph 2, are modifications introduced by way of waiver of the sovereign's rights. Had they been omitted the true question would still have been the same, though arising in a more acute form, namely, does this exercise of the right of retaliation upon the enemy occasion inconvenience or injustice to a neutral, so extreme as to invalidate it as against him? In principle it is not the belligerent who creates an offense and imposes a penalty by his own will and then by his own authority

Liability to capture and condemnation.

empowers and directs the court of prize to enforce it. It is the law of nations, in its application to maritime warfare, which at the same time recognizes the right, of which the belligerent can avail himself sub modo, and makes violation of that right, when so availed of, an offense, and is the foundation and authority for the right and duty of the court of prize to condemn, if it finds the capture justified, unless that right has been reduced by statute or otherwise, or that duty has been limited by the waiver of his rights on the part of the sovereign of the captors.

It is equally inadmissible to describe such an order in council as this as an executive measure of police on the part of the Crown for the purpose of preventing an inconvenient trade, or as an authority to a court of prize to punish neutrals for the enjoyment of their liberties and the exercise of their rights. Both descriptions, as is the way with descriptions arguendo, beg the question. Undoubtedly the right of retaliation exists. It is described in the *Zamora*[79]; it is decided in the *Stigstad*,[80] as it had so often been decided by Sir William Scott over a century ago. It would be disastrous for the neutral, if this right were a mere executive right not subject to review in a prize court; it would be a denial of the belligerents' right, if it could be exercised only subject to a paramount and absolute right of neutrals to be free to carry on their trade without interference or inconvenience

Scott's decisions.

This latter contention has already been negatived in the *Stigstad*.[80] The argument in favor of the former, drawn from the decisions of Sir William Scott, seems to their lordships to be no less unacceptable. With the terms of

Orders in council, 1806–1812.

the proclamations and orders in council from 1806 to 1812 their lordships are not now concerned. They were such that the decisions on them in many cases involved not merely the use of the term "blockade" but discussion of, or at least allusion to, the nature of that right. It is, however, in their opinion a mistake to argue, as has been argued before them, that in those decisions the right to condemn was deemed to arise from the fact that the cases were cases of blockade, although the occasion for the blockade was the passing of a retaliatory order. In their opinion Sir William Scott's doctrine consistently was that retaliation is a branch of the rights which the

[79] [1916] 2 A. C. 77. [80] [1919] A. C. 279.

law of nations recognizes as belonging to belligerents, and that it is as much enforceable by courts of prize as is the the right of blockade. They find no warrant or authority for holding that it is only enforceable by them when it chances to be exercised under the form or the conditions of a valid blockade. When once it is established that the conduct of the enemy gave occasion for the exercise of the right of retaliation, the real question is whether the mode in which it has been exercised is such as to be invalid by reason of the burden which it imposes on neutrals, a question preeminently one of fact and of degree.

The onslaught upon shipping generally which the German Government announced and carried out at the beginning of 1917 is now matter of history. Proof of its formidable character, if proof were needed, is to be found in a comparison between the retaliation orders in council of 1915 and of 1917, and their lordships take the recitals of the latter order as sufficiently establishing the necessity for further invoking the right of retaliation. They address themselves accordingly to what is the real question in the present appeal, namely, the character and the degree of the danger and inconvenience to which the trade of neutrals was in fact subjected by the enforcement of that order. They do not think it necessary to criticize theoretic applications of the language of the order to distant seas, where the enemy had neither trade nor shipping, a criterion which was argued for but which they deem inapplicable. Nor have they been unmindful of the fact that, to some extent, a retaliatory order visits on neutrals the consequences of others' wrongdoing, always disputed, though in the present case hardly disputable, and that the other belligerent, in his turn and also under the name of retaliation, may impose upon them fresh restrictions; but it seems to them that these disadvantages are inherent in the nature of this established right, are unavoidable under a system which is a historic growth and not a theoretic model of perfection, and are relevant in truth only to the question of degree. Accordingly they have taken the facts as they affected the trade in which the *Leonora* was engaged, and they have sincerely endeavored, as far as in them lay, to view these facts as they would have appeared to fair-minded and reasonable neutrals and to dismiss the righteous indignation which might well become those who recall only the crisis of a desperate and terrible struggle.

Danger and inconvenience to neutral trade.

Compliance with the requirements of the order in council would have involved the *Leonora* in difficulties, partly of a commercial and partly of a military character. Her voyage, and with it the ordinary expenses of her voyage, would have been enlarged, and the loss of time and possibly the length of the voyage might have been added to by the fact that no port or class of ports of call had been appointed for the purpose of the order. Inconvenience of this character seems to be inevitable under the circumstances. In so far as it is measurable entirely in terms of money, the extra expense is such as could be passed on to the parties liable to pay freight, and neither by itself nor in connection with other and more serious matters should this kind of inconvenience be rated high.

Routing.

It is important to observe that the order does not forbid the carriage of the goods in question altogether. The neutral vessel may carry them at her peril, and that peril, so far as condemnation is concerned, may be averted if she calls at an appointed port. The shipowner, no doubt, would say that if his ship is to make the call he will never be able to ship the cargo, for its chance of escape would be but small, and that if he is to get the cargo he must risk his ship and undertake to proceed direct to her destination. The contention is less formidable than it appears to be on the surface. Their lordships know well, and the late president with his experience knew incomparably better, with what ingenuity and artifice the origin of a cargo and every other damaging circumstance about it have been disguised and concealed where the prize of success was high and the parties concerned were unfettered by scruples and inspired by no disinterested motives. They think that the chance of escape in a British port of call must be measured against the enormous economic advantage to the enemy of carrying on this export trade for the support of his foreign exchange and the benefit of his much-needed imports, and they are convinced that the chance might well be sufficient to induce the promoters of the trade both to pay, and indeed to prepay, whatever freight the shipowner might require in order to cover extra insurance and the costs of a protracted voyage, and to give to the actual shipper such favorable terms of purchase, insurance, or otherwise, as would lead him to expose his cargo to the risk of detection of its origin. They are far from thinking that compliance with the order would exclude neutrals from all the advantage

of the trade. If the voyages were fewer in number, they would tend to be more profitable singly, and in any case this particular traffic is but a very small part of the employment open, and legitimately so, to neutral traders, and the risk of its loss need not be regarded as of great moment.

Dutch municipal law.

There is also some evidence, though it is not very clear, that Dutch municipal law forbade, under heavy penalties, that such a deviation as would be required by a call at a British port should be made by a Dutch ship which had cleared for Sweden. If, however, the order in council is in other respects valid, their lordships fail to see how the rights of His Majesty under it can be diminished or the authority of an international court can be curtailed by local rules, which forbid particular nationals to comply with the order. If the neutral is inconvenienced by such a conflict of duty, the cause lies in the prescriptions of his own country's law, and does not involve any invalidity in the order.

No retaliation by other allied powers.

Further, it is pointed out that, with the exception of France, the other allied powers did not find it necessary to resort to a similar act of retaliation, and it is contended that, upon a comparison with the order of 1915 also, the consequences involved in a disregard of the order of 1917 were of unnecessary severity and were unjustifiable. The first point appears to be covered by the rule that on a question of policy—and the question whether the time and occasion have arisen for resort to a further exercise of the right of retaliation is essentially a question of policy—a court of prize ought to accept as sufficient proof the public declarations of the responsible executive, but in any case the special maritime position of His Majesty in relation to that of his allies affords abundant ground for refusing to regard a different course pursued by those allies as a reason for invalidating the order of 1917. If the second point involves, as it seems to imply, the contention that a belligerent must retaliate on his enemy, so far as neutrals are concerned, only on the terms of compensating them for inconvenience, if any is sustained, and of making it worth their while to comply with an order which they do not find to be advantageous to their particular interests, it is inconsistent with the whole theory on which the right of retaliation is exercised. The right of retaliation is a right of the belligerent, not a concession by the neutral. It is enjoyed by law and not on suffer-

ance; and doubly so when, as in the present case, the outrageous conduct of the enemy might have been treated as acts of war by all mankind.

Accordingly the most material question in this case is the degree of risk to which the deviation required would subject a neutral vessel which sought to comply with the order. It is said, and with truth, that the German plan was by mine and by submarine to deny the North Sea to trade; that the danger, prospective and actual, which that plan involved must be deemed to have been real and great, or else the justification of the order itself would fail; and that the deviation, which the *Leonora* must have undertaken, would have involved crossing and recrossing the area of peril.

Degree of retaliation.

Their lordships recall and apply what was said in the *Stigstad*, that in estimating the burden of the retaliation account must be taken of the gravity of the original offense which provoked it, and that it is material to consider not only the burden which the neutral is called upon to bear, but the peril from which, at the price of that burden, it may be expected that belligerent retaliation will deliver him. It may be—let us pray that it may be so—that an order of this severity may never be needed, and therefore may never be justified again, for the right of retaliation is one to be sparingly exercised and to be strictly reviewed. Still the facts must be faced. Can there be a doubt that the original provocation here was as grave as any recorded in history; that it menaced and outraged neutrals as well as belligerents; and that neutrals had no escape from the peril, except by the successful and stringent employment of unusual measures, or by an inglorious assent to the enslavement of their trade? Their lordships have none.

On the evidence of attacks on vessels of all kinds and flags, hospital ships not excepted, which this record contains, it is plain that measures of retaliation and repression would be fully justified in the interest of the common good, even at the cost of very considerable risk and inconvenience to neutrals in particular cases. Such a conclusion having been established, their lordships think that the burden of proof shifts, and that it was for the appellants to show, if they desired, that the risk and inconvenience were in fact excessive, for the matter being one of degree it is not reasonable to require that the Crown, having proved so much affirmatively, should

further proceed to prove a negative and to show that the risk and inconvenience in any particular class of cases were not excessive. Much is made in the appellants' evidence of the fact that calling at a British port would have taken the *Leonora* across a German mine field, but it is very noticeable that throughout the case the very numerous instances of losses by German action are cases of losses by the action of submarines and not by mines. The appellants filed a series of affidavits, stating in identical terms that in proceeding to a British port of call vessels would incur very great risk of attack by submarines, especially if unaccompanied by an armed escort. Of the possibility of obtaining an armed escort or other similar protection they say nothing, apparently because they never had any intention of complying with the order in council, and therefore were not concerned to ascertain how much danger or how little their compliance would really involve. Proof of the amount of danger involved in crossing the mine field in itself is singularly lacking, but the fact is plain that after a voyage of no extraordinary character the *Leonora* did reach Harwich in safety.

Under these circumstances their lordships see no sufficient reason why, on a question of fact, as this question is, they should differ from the considered conclusion of the president. He was satisfied that the order in council did not involve greater hazard or prejudice to the neutral trade in question than was commensurate with the gravity of the enemy outrages and the common need for their repression, and their lordships are not minded to disturb his finding. The appeals accordingly fail. Their lordships will humbly advise His Majesty that they should be dismissed with costs. Decision.

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## THE "DÜSSELDORF."

[Privy Council.]

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

July 29, 1920.

[1920] A. C. 1034.

Appeal from that portion of a decree of the president of the admiralty division (in prize),[81] dated May 12, 1919, which has disallowed a claim in respect of costs and

[81] [1919] P. 245.

damages incurred by reason of the capture and detention of the German steamship *Düsseldorf* and her cargo. The claim and the appeal were on behalf of the Norwegian Government, and were made under the circumstances appearing in the judgment of their lordships.

Statement of the case.

July 29. The judgment of their lordships was delivered by Lord Sumner. In this case the *Düsseldorf*, a German ship, was making her way from Narvik, with a cargo of iron ore, down the Norwegian coast toward the entrance to the Baltic, and so to Emden. Her object was to keep within Norwegian territorial waters, so as to baffle capture by British men-of-war. She was taken by H. M. S. *Tay and Tyne* at a point off Buholmen and Grisholmen, which was, as it turned out, a little (say, 200 yards) within the territorial limits. The learned president, Lord Sterndale, found that the commander of the *Tay and Tyne* had no intention of violating Norwegian neutrality, but that, by an error of judgment, which their lordships consider to have been very pardonable, he conceived that the 3-mile line should be drawn a little farther to the east than its true position. It is plain that the German shipowners had a narrow and somewhat lucky escape, and that the sovereignty of Norway suffered the minimum of prejudice from this unintentional violation.

The present claim was made on behalf of His Majesty the King of Norway by the appellant, Mr. Waldemar Eckell, the Royal Norwegian consul general in London. His claim was, first, for delivery up of the *Düsseldorf* and her cargo or its proceeds; secondly, for the cost of removing her to Norway; thirdly, for costs and fees payable to the marshal of the prize court or otherwise upon her delivery; and fourthly, the vessel having been regularly requisitioned by His Majesty's Government pending the hearing before the prize court, for an account of profits made by the Crown from the use of the ship, or alternatively, for payment of a reasonable sum for her use.

Ownership of the vessel.

It may be well to consider in the first instance how this matter stands, apart from authority. In the vessel herself and her cargo, on their own account, the Norwegian Government have neither right, title, nor interest, nor had they ever even possession. The German owners have all the right and interest, and, in the absence of any treaty or convention dealing with the case, they can neither come before the court directly as claimants nor

can they be allowed to do indirectly what is directly incompetent. Indeed, as against them, the capture is good, being the capture of enemy property; and the "claim of territory," as it is called, is one which is available to the territorial sovereign only, and not to the private shipowner. These considerations, apart from the validity and effect of orders, regularly made, permitting the admiralty to requisition the vessel, at once dispose of the fourth claim, namely, that for profits or freight, or hire in respect of the benefit which the British Government obtained from requisitioning the vessel under the prize rules. If the appellant recovered any such sum, it would be held simply in the interest of the enemy owners. No claim has been made, nor has any evidence been given, on the footing that the Norwegian Government have come under any pecuniary liability to the owners of the *Düsseldorf*, nor is there any suggestion that the seizure involved them in any outlay or pecuniary disadvantage outside of these proceedings. No one would wish to make light of a violation of territorial sovereignty, but in itself this is a matter arising between sovereigns and, apart from the peculiar position of captors who are bound to bring their alleged prize before the court, it would in itself be non-justiciable, for in effect the prize court would be called on to pronounce a decree, founded on the conduct of his offices, against the sovereign in virtue of whose commission it is authorized to act, and to evaluate imponderable wrongs, which lie outside the category of those with which it is wont to deal.

Violation of territorial sovereignty.

A court of prize is not, as such, a disciplinary tribunal for officers in His Majesty's Navy, charged with the correction of errors committed by them while discharging their duties. Any complaint against such officers which the Government of Norway might have, and any claim for amends for an invasion of the territorial sovereignty of Norway, would fitly be preferred through diplomatic channels to His Majesty's Government for examination and redress.

Requisition.

The facts that the court found itself regularly in possession of the *Dusseldorf*, and subsequently made a regular order giving leave to requisition her, are at once the foundation of the jurisdiction and the occasion of the Norwegian Government's appearance. It is a fortunate circumstance that the ancient practice, by which courts of prize entertain litigious claims of this

kind made on behalf of neutral powers, led long ago to the submission of one class of international questions, at any rate, to a judicial determination instead of to the arbitrament of arms, and so provided for a solution of vexed questions at once peaceful, honorable, and friendly. It may, therefore, well be that the rules which apply to capture on the high seas are by no means closely applicable to capture in neutral territorial waters. On the high seas, if there is reasonable ground for detention, the risk of it is one which even a neutral must run, and the appropriate remedy is the release of the ship in this country. In neutral waters, on the other hand, no capture should be made at all, and rules applicable to the high seas are not in pari materia. Simple release of the ship in this country to the claimant sovereign may be an inadequate redress. The fact that the court has duly received into its charge and jurisdiction a ship which ought not to have been seized at all, leads to the conclusion that the true claim of the appellant is for a restitutio in integrum, so far as the Government of Norway is concerned; but that, naturally as their lordships would incline to a treatment of it as liberal and ungrudging as possible, they are still bound to act judicially and to follow legal principles and the decisions already given in prize cases.

Detention.

Damages.

The authorities prior in date to the recent war are few in number and are somewhat indeterminate. In cases between captors and private owners the jurisdiction to award damages and costs against the former on the ground of their misconduct, or to refuse to give them in favor of the latter where their conduct had been suspicious or irregular, was long ago well recognized, but the language used in stating the grounds of it was not uniform. Sometimes Sir William Scott spoke of such decrees as giving compensation to the suffering owners, whether the misconduct of the captors was intentional or not; sometimes they were made avowedly as a punishment to deter others, generally privateers, from the repetition of offenses. In the *Ostsee* [82] the Privy Council laid it down that the former is the better view, though, if so, it is not easy to appreciate the relevancy of inquiring whether the captors acted under a reasonable mistake. From such a jurisdiction little guidance is to be obtained in the present case. Of actual "claims of territory"

Privateers.

[82] 9 Moo. P. C. 150.

but few are reported. There are three decisions of Sir William Scott—The *Twee Gebroeders*,[83] the *Vrow Anna Catharina*,[84] and the *Anna*[85]—and during the present war, in addition to the present case, there have been the *Lokken* (July 26, 1918),[86] the *Valeria*,[87] and the *Pellworm* (Apr. 21, 1920).[88] No point has been argued in the present case as to the effect of the provisions of the treaty of Versailles, such as was discussed in the *Pellworm*.[88]

In the *Vrow Anna Catharina*,[89] Sir William Scott observes: "The sanctity of a claim of territory is undoubtedly very high. * * * When the fact is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy; and if the captor should appear to have erred willfully, and not merely through ignorance, he would be subject to further punishment."

In the *Twee Gebroeders* [83] the same great authority condemned the conduct of the captors as having been in violation of a neutral sovereign's rights; but held that, as they had not intended to commit any wrong, and as it was not easy for them to have ascertained where the neutral boundary ran, they ought not to be held liable in damages and costs. On the other hand, in the *Anna*,[85] which was the case of a privateer and not of a regular King's ship, there had been deliberate abuse of the territorial waters of the United States, and in a claim of territory restitution of the captured vessel was accompanied with a decree for payment of damages and costs. It does not appear what the measure of these damages was, or whether the Government of the United States had been put to actual expense by the conduct of the privateer.

In the present case there can be no doubt that the appellant was entitled to have the *Düsseldorf* (and the proceeds of the cargo) released to him on behalf of His Majesty the King of Norway. Had the naval officer's error been brought to the notice of the British Govern-

[83] 3 C. Rob. 162. [84] 5 C. Rob. 15. [85] 5 C. Rob. 373. [86] Unreported.
[87] [1920] P. 81. [88] [1920] P. 347. [89] 5 C. Rob. 15, 16.

ment forthwith, before the *Düsseldorf* was brought before the prize court, her prompt return to Norway on behalf of the Crown, with suitable expressions of regret and regard, would, it can hardly be doubted, have been an ample satisfaction to the King of Norway for the unintentional wrong done. In the event, which has happened, of the ship's being placed in the prize court, the question now is what further relief, if any, should be accorded to the claimant.

Damages for violation of neutrality.

The learned president, Lord Sterndale, before whom this question was hardly sufficiently argued, decided, on the authority of the *Twee Gebroeders* (90), that there was no ground for decreeing such costs and damages to the claimant as it has been the practice to grant where the violation of neutrality has been high-handed, negligent, or designed. If this were the sole ground on which the matter could be put, there can be no doubt that his decision ought to be affirmed.

It is, however, now on fuller argument contended that, as the right of the Norwegian Government is at least for restoration, this involves either the physical redelivery of the *Düsseldorf* in Norwegian waters, which is not really asked for, or the payment of the costs of her return voyage. The ground is that, if this be not so, the Norwegian Government must either pay this expense, and so suffer pecuniarily for the error of a British officer, or leave the German owners to navigate the vessel for themselves. In any case, as between the Norwegian Government and persons whose property at the time of the seizure was within the territorial jurisdiction of the King of Norway and sub protectione regis, this would place his Government in the invidious position of leaving them without any redress at all for a seizure which occurred notwithstanding their claim to the protection of the Norwegain Crown. There is a further matter for consideration, which is this. If the hearing had been completed and the release had been decreed, flagrante bello, as might have been the case, and if the Norwegian Government, to avoid expense and responsibility for which they would receive no recompense, had forthwith handed the *Düsseldorf* over to her owners before she had reached the security of neutral waters, she might have been captured again. In that case the Government of His Majesty the King of Norway might have been exposed to the observation that

90 3 C. Rob. 162.

their proceedings resulted merely in the vindication of the public sovereignty of the Kindom of Norway without advantage or redress to the private rights which had suffered interference while within the limits of that realm. Their lordships think that this argument is well founded, and that, alike from the necessity of performing and paying for the voyage to Norway at their own expense, and from the possibility of being exposed to any such reflection, the Norwegian Government ought to be protected. They are therefore entitled to costs of the voyage to Norway paid and borne by them.

Claim for repayment of marshal's fees.

The claim for repayment of the marshal's fees and other similar sums rests on a different footing. Here the important points are that the ship came regularly into the custody of the officers of the court and, but for the requisitioning, which also was a regular proceeding, would have remained throughout in its charge, and so would have had the benefit of care and protection, which would inure to enhance the vessel's value or avert depreciation. Even in the hands of the Admiralty, she has necessarily had the benefit of a certain amount of upkeep in the ordinary course of user, and there is no suggestion of ill-usage, neglect, or willful deterioration. Although, as now appears, the captors had no legal right to possession, they were in fact in possession in all good faith, and, in placing the ship and cargo in the custody of the marshal, they acted in discharge of an obligation of a very binding character, from the observance of which it would be most inexpedient in any way to deter persons in their position. Further, in a matter of costs it is particularly necessary to observe settled rules of practice, for costs are always somewhat artificial matters and dependent on the practice of the court. It has been laid down in the *Franciska* [91] by their lordships' board that such costs as those now in question are properly charges on the property itself, because it is for the benefit of whom it may concern that the ship and cargo should be placed in the care and custody of the marshal of the court. This decision is, of course, binding upon their lordships, and they therefore think that these charges form a proper charge against the ship and fall to be discharged by those to whom she is delivered up, nor is it necessary or appropriate to inquire under what form or by what process, if

[91] 10 Moo. P. C. 73.

any, they may be recovered over from the German owners.

It is possible that some part or the whole of the costs of transferring the *Dusseldorf* to neutral waters has been paid, or contracted to be paid, by her owners, and so has not fallen, or, if they perform their contract, will not ultimately fall, on the Government of Norway. In such a case the appellant will not recover them in these proceedings.

Decision.

In the result the appeal will be allowed with costs, and the decree of the president will be varied by directing that the appellant is entitled to be paid such expenses of removing the *Dusseldorf* from British waters to Norwegian or other neutral waters as may have fallen, or will ultimately fall, on the Government of Norway, but otherwise the decision of the president will be affirmed. The case will be remitted to the prize court to make the necessary formal decree and to direct a reference to the registrar. Their lordships will humbly advise His Majesty to this effect.

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